IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 2769
Docket No. 11

THE PORT OF PORTLAND, a municipal corporation,

vs.

WILHELM WILHELMSEN, owner, etc., and THE PORT OF PORTLAND, etc.,

vs.

KNOHR & BURCHARD, etc., et al., and WILHELM WILHELMSEN,

Claimant,

vs.

KNOHR & BURCHARD, etc., et al.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF THE MOTION.

BRIEF ON THE MERITS

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

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PORTLAND PRINTING HOUSE CO., PORTLAND, OREGON

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MOTION TO DISMISS APPEAL

in cause No. 6111 entitled Wilhelm Wilhelmsen, libelant and appellee, vs. the bark "Thielbek," Knohr & Burchard, Nfl., claimants and appellants, The Port of Portland, respondent and appellant, **AND BRIEF IN SUPPORT OF THE MOTION.**

Wilhelm Wilhelmsen, the above named appellee, comes now into this Court, by his proctor, and questions the jurisdiction of this Court upon appeal in said cause No. 6111 above described and for causes and reasons in the record appearing and hereinafter set forth moves to dismiss

said appeal of The Port of Portland in said cause, to-wit:—

FIRST:

That said attempted appeal was prematurely taken for that all of the proceedings in said cause 6111 between all of the parties thereto had not been terminated before February 7, 1916, long after said appeal was attempted to have been taken.

(Record Vol. 1, pp. 129; 136; 145, 6.)

SECOND:

That said decree appealed from was not and is not a final decree for that it lacked the requisite finality as to all of the parties to the record in two particulars: In the determination of the matters with reference to Knohr & Burchard, claimants and owners, and with reference to the subject of costs as between all of the parties.

(Same record references.)

THIRD:

That no appeal has been taken from a final decree after final action as to all of the parties by the Court below so as to give this Court jurisdiction to hear all of the matters determined below.

FOURTH:

That as to said attempted appeal there is not any specification of errors in the brief support-

ing said pretended appeal as required by Rule 24 of this Court and from which this Court and counsel can determine what of right ought to be heard upon said attempted appeal.

WILLIAM C. BRISTOL,
Proctor for Wilhelm Wilhelmsen.

May 4, 1916.

POINTS AND AUTHORITIES SUPPORTING THE MOTION TO DISMISS APPEAL

By the judicial code, section 102, the terms of the District Court in Oregon commence and end on the respective first Mondays of March, July and November.

The decree in cause 6116 was rendered and entered the 24th of June, 1915 (*March term.*)

(Record Vol. 1 , pp. 246-248.)

On July 3, 1915, The Port of Portland appealed from that decree, and on July 7, 1916, filed its papers therefor. (*Still, March term.*)

(Record Vol. 1, pp. 254-261.)

Wilhelmsen moved to set aside this decree and against its entry.

(Record Vol. 1, p. 249.)

And on the 19th day of July, at the July term of said Court, Wilhelmsen's motion was denied.

On July 21, 1915, Wilhelmsen appealed from the decree of June 24, 1915, in cause 6116. (*July term.*)

(Record Vol. 1, p. 262, see assignments of errors,

(Record Vol. 1, pp. 264-276.)

The decree in the Wilhelmsen case 6111 was not entered until the 25th day of October, 1915. (*July term.*)

(Record Vol. 1, pp. 126-127.)

The Court, after the March term, on the *ex parte* application of The Port of Portland undertakes to enter an order consolidating all the causes on appeal on the 25th day of October, 1915. (*July term.*)

(Record Vol. 1, p. 129.)

It will be noted that the "Thielbek" decree was entered in the *March term, to-wit,* June 24, 1915, and that appeals were taken from it in the *July term.*

But the *November term* of the District Court had commenced before The Port of Portland presented its attempted appeal in the Wilhelmsen cause, No. 6111, and final decree was entered January 3, 1916.

(Record Vol. 1, p. 137.)

So the situation presented is this:—

"Thielbek" decree June 24, 1915;

Appeals taken July, 1915;

Ex parte consolidating order October 25, 1915.

Neither Grace nor duPont had appealed in causes 6129 and 6130 and there had not yet been any appeal in cause 6111.

Cause 6111 was not disposed of until January 3, 1916, in the *November term.*

All of the proceedings which culminated in the order made in 1916, including the order of January 3, 1916, were made *after the March term had expired in which the "Thielbek" decree*

was entered and were made after the July term had expired in which the Wilhelmsen decree was entered.

Of the causes originally before the Court then we have now the "Thielbek" case, No. 6116, from the decree in which both The Port of Portland and Wilhelmsen appealed; and The Port of Portland has undertaken to bring here cause 6111, the Wilhelmsen case, as by an attempted appeal by a notice served against the decree of October 25, 1915, before the proceedings in that cause were final.

So Wilhelmsen presents this motion to dismiss the attempted appeal and affirm the judgment as to him in cause 6111, notice of which was given at the time Wilhelmsen filed his additional assignments of error on the 21st day of February, 1916.

(Record Vol. 1, p. 281, at middle of p. 284.)

If it was proper for the Court below to enter a final decree in favor of Knohr & Burchard and to determine costs in favor of Knohr & Burchard and to deny costs to Wilhelmsen, as the Court did do as shown by the record at the time it did it, then it must follow that the decree appealed from by The Port of Portland, entered October 25, 1915, is not final as to The Port of Portland.

It is only from final judgments or decrees

that appeals can be taken and no arrangement of the situation in this Court can give jurisdiction.

Mordecai v. Lindsay, 19 How. 199, at pp. 201, 2; 15 L. Ed. 624.

Green v. Fisk, 103 U. S. 518; 26 L. Ed. 485.

Bowker v. United States, 186 U. S. 141, 2; 46 L. Ed. 1092.

The final decree was not signed and filed until Knohr & Burchard obtained it and the rights of the parties are determined by the date of the actual entry.

Providence Rubber Co. v. Goodyear, 6 Wall, 153 at 156.

It is the rule, *and with uniform enforcement,* in the Circuit Courts of Appeals that Rule 24 with respect to specification of errors must be complied with and that assignments of errors in the record are not sufficient, and in the absence of specifications of error the result has been to dismiss the appeal or affirm the judgment.

Western Assurance Co. v. Polk, (C. C. A. 8th C.), 104 Fed. 649.

The brief of The Port of Portland as served in this case does not comply with Rule 24 of this Court not only in the case in which this motion is filed, but likewise in the other case of the *"Thielbek,"* No. 6116, but considering it from the point of this motion alone it is an absolute

necessity that Rule 24 be complied with and so decided in this Circuit.

Walton v. Wild Goose Mining Co. (C. C. A. 9th C.), 123 Fed. 209, 211.

And a motion to amend is denied and appeals are dismissed in such cases.

Moline Trust Bank v. Wylie, 149 Fed. 734.

It is respectfully submitted that The Port of Portland has not properly appealed in the Wilhelmsen cause, No. 6111, as in this motion specified; and this Court is without jurisdiction in that case to hear the appeal.

WILLIAM C. BRISTOL,
Proctor for Wilhelm Wilhelmsen.

May 4, 1916.

Brief on the Merits

STATEMENT OF THE CASE

(a) *Subject matter and who involved.*

(b) *The pleadings and what they show.*

(c) *Theory and issue.*

(d) *The decrees, and their dates of rendition.*

(e) *The appeals and their relation to each original case.*

(f) *The case now before this Court.*

(a) *Subject matter and who involved:*

This record presents a *cause of collision* on navigable waters of the United States within the District of Oregon.

The bark *"Thielbek"* is and was a *German ship* owned by Knohr & Burchard, Nfl., Hamburg, Germany; and a treaty is now and was in August, 1913, in force and effect between Germany and the United States, among other things providing for uniform and consistent administration of the laws of the respective countries relative to maritime and other subject matters.

The steamship *"Thode Fagelund"* is and was a *Norwegian* ship owned then and now by Wilhelm Wilhelmsen of Tonsberg, Norway; and a treaty exists between Norway and the United States in force August, 1913, that among other things governs the transactions of the respective treaty-making powers upon all the subject matters contracted about, including maritime affairs.

The procedure in admiralty in collision cases is fixed by the fifteenth (15) admiralty rule promulgated by the Supreme Court of the United States with congressional authority, and under that rule The Port of Portland was sued *in personam* with respect to the things occasioned and committed by its tug boat and pilots resulting in the collision.

A maritime tort necessarily arose from this collision under the general admiralty and mari-

time jurisprudence of the United States, the exclusive jurisdiction to hear and determine such causes being vested by the acts of Congress exclusively in the District Courts of the United States sitting in admiralty, regardless of any state statute.

(b) *The pleadings and what they show:*

It was the contention of the libellants, Knohr & Burchard, owners of the *"Thielbek,"* (1) either that she was damaged by the navigation of the *"Fagelund"* under the direction of Nolan, or (2) *that Pease was inexperienced and the collision was occasioned by his specified negligence* and the wrongful navigation of the *"Ocklahama."*

(Record, Vol. 1, p. 171.)

It was, moreover, the contention of Knohr & Burchard that the circumstances of the collision involving their ship, the *"Thielbek,"* authorized proceedings to limit their liability; and as owners of the *"Thielbek"* they did on October 16, 1913, present their petition to limit their liability. This matter was before the Court below *long prior* to the trial resulting in the decrees (Record, Vol. 1, pages 294, 301), *in fact one whole year before.*

(Record, Vol. 1, page 94.)

Although Knohr & Burchard thus petitioned to limit their liability, nevertheless, when they

filed their libel in Cause 6116 they adopted and repropounded Articles VI to XII of the original libel of Wilhelmsen.

(Record, Vol. 1, pages 160-170.)

It is very important to accurate understanding of the cause tried to see fully the recitation of facts made by Knohr & Burchard as they present the most favorable view of their own theory of recovery. At record, Vol. 1, pages 36 and 37, they positively allege and show negligent navigation as follows:—

The *"Ocklahama,"* with the *"Thielbek"* in tow, having weighed anchor at Young's River about three minutes past three as aforesaid, proceeded with her tow as one vessel upstream, keeping close in towards the Astoria docks, to-wit, **ABOUT TWO HUNDRED (200) FEET OFF, AND WHEN CLOSE TO CALENDAR DOCK IN THE CITY OF ASTORIA, THE PILOT OF THE "OCKLAHAMA" SIGHTED THE NORWEGIAN STEAMER "THODE FAGELUND" BEYOND AND OVER THE DREDGE "CHINOOK," AND EVIDENTLY PROCEEDING DOWNSTREAM; AT THIS TIME HE COULD SEE THE LIGHTS OF THE "THODE FAGELUND," BUT NOT HER HULL, AND SHE WAS APPROXIMATELY FROM FIFTEEN HUNDRED (1500) TO TWO THOUSAND (2000) FEET AWAY**; the *"Ocklahama"* was immediately put under a slow bell, and a few seconds thereafter the *"Thode Fage-*

lund" blew two whistles, signifying her desire to pass the *"Ocklahama"* and tow on her starboard hand; the *"Thode Fagelund"* was at this time still behind the *"Chinook,"* showing to the *"Ocklahama"* her green side light and two white range lights, and was proceeding on a course diagonally across the course of the *"Ocklahama"* and *"Thielbek,"* which at this time showed their red side light to the *"Thode Fagelund,"* the *"Ocklahama"* and *"Thielbek"* being at that time on *her starboard hand;* **THE "OCKLAHAMA" DID NOT ANSWER THE FIRST SIGNAL OF THE "THODE FAGELUND," FOR THE REASON THAT IT WAS APPARENT TO THE PILOT OF THE "OCKLAHAMA" THAT IN A FEW SECONDS THE "THODE FAGELUND" WOULD EMERGE FROM BEHIND THE "CHINOOK," WHEN HE WOULD THEN BE BETTER ABLE TO TAKE IN THE WHOLE SITUATION, BUT THE HELM OF THE "OCKLAHAMA" WAS PUT TO STARBOARD, AND SHE AND THE "THIELBEK" IMMEDIATELY COMMENCED TO SWING TO PORT; THAT IN A VERY SHORT TIME, TO-WIT, TWENTY (20) OR THIRTY (30) SECONDS, THE "THODE FAGELUND" CAME INTO THE CLEAR FROM BEHIND THE STERN OF THE "CHINOOK," AND, SHOWING HER GREEN LIGHT AND TWO MASTHEAD RANGE LIGHTS, AGAIN BLEW TWO (2) WHISTLES, SIGNIFYING HER CONTINUED INTENTION TO PASS TO THE STARBOARD OF THE**

"OCKLAHAMA" AND TOW; at this time, libelants believe and therefore say that the only side light of the *"Ocklahama"* and tow visible to the *"Thode Fagelund"* was the red light; this signal the *"Ocklahama"* immediately answered by two (2) whistles, signifying her assent to the passage; **AT OR JUST BEFORE THIS EXCHANGE OF SIGNALS, THE ENGINES OF THE "OCKLAHAMA" WERE STOPPED, AND AT THIS EXCHANGE OF SIGNALS HER ENGINES WERE BACKED HALF SPEED, AND IMMEDIATELY THEREAFTER FULL SPEED ASTERN**, and her helm was thrown to port, which, by reason of the reversed paddle wheel throwing the water a gainst the rudders, threw the stern of the *"Ocklahama"* and *"Thielbek"* to the starboard and their bows to port.

(Record, Vol. 1, pp. 36 and 37,)

These facts are alleged acts performed by Pease. These are the very acts for which the trial court condemned the navigation of the "Thode Fagelund."

(Record, Vol. 1, p. 92-3.)

It is also alleged by both claimants and respondent the port of Portland:

The two vessels proceeded, as one and under the control of the "Ocklahama," on their voyage upstream through the harbor at Astoria.

(Vol. 1. Record p. 43.)

That the said pilot on the "Ocklahama" was at the wheel and was in general charge of both vessels and a watchman was on duty with him in the pilot house.

(Vol. 1. Record p. 44.)

That the two vessels proceeded as one on their voyage up the Columbia River on the Oregon side thereof, to a point in front of the port of Astoria about abreast of the Callender Dock.

(Vol. 1. Record p. 44.)

The "Ocklahama" was by her crew lashed on the port quarter of the "Thielbek" with her stern projecting beyond the stern of the "Thielbek," and the two vessels, proceeding as one and under the sole control of the "Ocklahama," commenced their voyage up stream through the harbor at Astoria.

(Art. IV. Rec. Vol. I. p. 154, Libel of Knohr & Burchard.)

In the answer of the port of Portland it is alleged:

The engines upon the steamboat "Ocklahama" were stopped and immediately thereafter the said steamboat "Ocklahama" was backed full speed on a port helm and continued to back full speed on a port helm for between three and four minutes and practically stopped the headway of the steamboat "Ocklahama" and of the bark "Thielbek," and a few seconds later the steamer

"Thode Fagelund" and the bark "Thielbek" came together in such manner that the stern of the bark "Thielbek" struck and collided with the port bow of the steamer "Thode Fagelund" at and near the stem thereof in the manner set forth in the libel.

(Record, Vol. I. p. 49.)

Amendment of June, 1908, The Port of Portland is authorized and empowered, among other things:

* * * "To purchase, lease, **CONTROL AND OPERATE STEAM TUG-BOATS AND STEAM AND SAIL PILOT-BOATS UPON SUCH RIVERS AND UPON THE COLUMBIA BAR PILOTAGE GROUNDS, AND TO COLLECT CHARGES FROM VESSELS EMPLOYING SUCH TUGS SO OPERATED AND FOR PILOTAGE SERVICES RENDERED BY EMPLOYES OF SAID THE PORT OF PORTLAND**, and said The Port of Portand shall have the right to claim and collect salvage for services rendered to vessels in distress **IN THE SAME MANNER AS A NATURAL PERSON. THE CHARGES FOR TOWAGE AND PILOTAGE SHALL BE FIXED BY THE BOARD OF COMMISSIONERS OF THE PORT OF PORTLAND AND SHALL BE PUBLIC AND PUBLISHED TO THE WORLD.** The charges for towage of sailing vessels shall include the services of such pilots as may be supplied by The Port of Portland. The charges

for pilots supplied by The Port of Portland to steam vessels shall be fixed by its Board of Commissioners, but shall in no respect exceed the charges fixed by the State of Oregon for pilots upon the bar pilotage grounds and upon the river pilotage grounds upon the Columbia and Willamette Rivers."

(Record Vol. I. Page 54.)

As the steamboat "Ocklahama" and the "Thielbek" so lashed together proceeded on their voyage up the river and were passing Calender Dock in Astoria harbor, the said A. L. Pease, Jr., pilot upon the "Ocklahama," being then in charge and directing the navigation of the steamboat and her tow

(Record Vol. I. p. 57.)

The Port of Portland further says: That as soon as the said pilot saw the lights of the steamer over the dredge "Chinook" the steamboat "Ocklahama" was put under a slow bell and that very soon thereafter the said pilot heard two short blasts of the steam whistle blown from the steamer, the lights of which were seen beyond the dredge "Chinook" and which afterwards proved to be the steamer "Thode Fagelund," but that, by reason of the fact that the steamer "Thode Fagelund" was at that time beginning to round the stern of the dredge "Chinook" the said pilot, A. L. Pease, Jr., was unable

to say with certainty whether a safe passage could be made to starboard and *that therefore no answer was given to the said two whistles until the steamer "Thode Fagelund" should* come out from behind the dredge "Chinook" and until the said pilot could determine whether the steamer "Thode Fagelund" could pass safely to starboard of the steamboat "Ocklahama" and the bark "Thielbek," *but that the said pilot at once put the helm of the steamboat "Ocklahama" hard astarboard in such manner that the steamboat "Ocklahma" with her tow swung to port;* that as soon as the "Thode Fagelund" came from behind the dredge "Chinook," and as soon as her position could be ascertained and was ascertained by the said pilot, A. L. Pease, Jr., *the said pilot heard two short blasts of the steam whistle blown from the steamer* "Thode Fagelund" and immediately answered the same by blowing two short blasts of the steam whistle from the steamboat "Ocklahama;" that said pilot having so ascertained the position of the steamer "Thode Fagelund" and her course, deemed that the said steamer "Thode Fagelund" could pass

Record Vol. I. pp. 57 and 58.)

safely on the starboard side of the steamboat "Ocklahama" and her tow, the bark "Thielbek;" that at said time the "Ocklahama" was approaching the dredge "Chinook" and that said pilot, A. L. Pease, Jr., believing that there was

danger, if the steamboat "Ocklahama" and her tow, the bark "Thielbek," should continue on the course upon which they were then moving, of their running upon and colliding with the said dredge "Chinook," thereupon and for the purpose of avoiding a collision with the dredge "Chinook" and for this purpose only, *at once stopped the engines* of the steamboat "Ocklahama" *and backed full speed astern on a port helm;* that at said time the pilot upon the "Ocklahama" believed that the said steamer "Thode Fagelund," pursuing the course which she was pursuing at the time she came from behind the dredge "Chinook" *and her position and course were ascertained by the said pilot,* would have passed safely to starboard of the steamboat "Ocklahama" and of her tow, the bark "Thielbek," but that the steamer "Thode Fagelund," instead of pursuing her course, or swinging to her port, began to swing to her starboard and continued to swing to her starboard until the red light of the steamer "Thode Fagelund" came in view of the Ocklahama;" *that the steamboat "Ocklahama" with her tow continued to back full speed astern for about three minutes so that most of the headway of the said steamboat and of the bark "Thielbek" had been stopped,* and during said time the said steamboat "Ocklahama" with her said tow continued to swing to her port.

(Record Vol. I. p. 59.)

Alleges that on the 24th day of August, 1913, at or about the hour of three o'clock in the morning the steamer "Thode Fagelund," **HAVING THE SAID PILOT M. NOLAN IN CHARGE AND DIRECTING HER NAVIGATION**, weighed anchor from a point in the Columbia River off and opposite the dock of the Oregon-Washington Railroad & Navigation Company in Astoria harbor, and, **UNDER THE DIRECTION OF SAID M. NOLAN AS PILOT STARTED AHEAD UNDER A SLOW BELL AND CONTINUED TO PROCEED UNDER SAID SLOW BELL FOR ABOUT FIVE MINUTES AND THEN INCREASED ITS SPEED TO HALF SPEED AHEAD** and continued to proceed at said half speed ahead until within about four hundred feet of and above the dredge "Chinook," a vessel about 450 feet in length, the property of the United States at said time, anchored in the Columbia River at a point off and about opposite the middle of the said dock and lying directly across the channel of said river, leaving the channel so obscured that one on a vessel in the channel of said river above where the said dredge was anchored could not see a vessel coming up the channel of said river below the point where the said dredge was anchored; that when the "Thode Fagelund" had arrived on her course at a point in said channel about 400 feet from and above the said dredge "Chinook," which was then swinging to flood tide with her stern toward the Astora side of the

channel, **THE SAID NOLAN, PILOT AS AFORESAID, BEING THEN ON WATCH AND DIRECTING THE NAVIGATION OF THE SAID STEAMER,** *saw a sailing vessel under tow almost head-on and about one-quarter of a point on the starboard bow of the said steamer, which sailing vessel was afterwards ascertained to be the bark "Thielbek," in tow of the steamboat "Ocklahama;" that when the said Nolan saw the said sailing vessel under tow, he blew two short blasts of the steam whistle on the said steamer,* signifying his intention to pass to starboard of the said sailing vessel under tow, he, the said Nolan, believing at said time that the said steamer "Thode Fagelund" could not pass safely to port of the said bark "Thielbek" and the steamboat "Ocklahama" and could pass safely to starboard of said bark "Thielbek" and the said steamboat "Ocklahama" by reason of the course which the said "Thode Fagelund" was then pursuing and by reason of the position of the said dredge "Chinook;" *that no answer to the said two blasts was heard on the steamer "Thode Fagelund;" that thereupon the said M. Nolan stopped the engines of the steamer "Thode Fagelund" and having then come out from behind the stern of the dredge "Chinook" and* deeming it safe to pass to starboard of the said

(Record Vol. I. pp. 62 and 63.)

sailing vessel and of the said steamboat "Ocklahama" and not safe to pass to port of the said

bark and the said steamboat, the said Nolan gave two short blasts of the steam whistle of the "Thode Fagelund" and immediately thereafter heard two short blasts in answer thereto given by the steamboat "Ocklahama"; that immediately after hearing the said two short blasts from the steamboat "Ocklahama," the steamer "Thode Fagelund" having then come from behind the dredge "Chinook," so that the position and the course of the bark "Thielbek" and of the steamboat "Ocklahama" could be more plainly seen, apprehended that there was imminent danger of a collision between said steamer "Thode Fagelund" and the said sailing vessel, **AND THAT THEREUPON THE SAID NOLAN AT ONCE REVERSED THE ENGINES OF THE "THODE FAGELUND" AND DROVE THE SAME FULL SPEED ASTERN IN ORDER TO RETARD THE HEADWAY OF THE STEAMER "THODE FAGELUND,"** so that the bark "Thielbek" and the steamboat "Ocklahama" might have time to pass on their course out of danger of a collision with the said steamer "Thode Fagelund" and immediately gave four short blasts of the steam whistle of the "Thode Fagelund" and at once and to further retard the headway of the "Thode Fagelund," dropped the port anchor of the "Thode Fagelund" and again gave four short blasts of her steam whistle of the "Thode Fagelund"; that each of said acts on the part of the pilot Nolan was done promptly, for the purpose

of and was adapted to avoid a collision between the bark "Thielbek" and the steamboat "Ocklahama" and the said steamer "Thode Fagelund."

(Record Vol. I. pp. 64 and 65.)

THE OWNERS OF THE "THIELBEK" SAY IN THEIR LIBEL, (following the fact that the "Ocklahama" did not answer the first signal), that in a very short time, to-wit: twenty (20) or thirty (30) seconds, the "Thode Fagelund" came into the clear from behind the stern of the "Chinook" and, showing her green light and two mast head range lights, again blew two (2) whistles signifying her continued intention to pass to the starboard of the "Ocklahama" and tow; at this time, libelants believe and therefore say that the only side light of the "Ocklahama" and tow visible to the "Thode Fagelund" was the red light; **THIS SIGNAL THE "OCKLAHAMA" IMMEDIATELY ANSWERED BY TWO (2) WHISTLES, SIGNIFYING HER ASSENT TO THE PASSAGE; AT OR JUST BEFORE THIS EXCHANGE OF SIGNALS, THE ENGINES OF THE "OCKLAHAMA" WERE STOPPED, AND AT THIS EXCHANGE OF SIGNALS HER ENGINES WERE BACKED HALF SPEED, AND IMMEDIATELY THEREAFTER FULL SPEED ASTERN, AND HER HELM WAS THROWN TO PORT, WHICH, BY REASON OF THE REVERSED PADDLE WHEEL THROWING THE WATER AGAINST THE RUDDERS, THREW THE STERN OF THE**

"OCKLAHAMA" AND "THIELBEK" TO THE STARBOARD AND THEIR BOWS TO PORT; THAT THE "OCKLAHAMA" CONTINUED BACKING FULL SPEED FROM THIS TIME UNTIL THE COLLISION.

(Record Vol. I. p. 157.)

AND ESPECIALLY ALLEGE THAT THE "OCKLAHAMA" WAS LEFT IN CHARGE OF A YOUNG AND INEXPERIENCED PILOT, AND THAT HER MASTER WAS IN HIS BUNK WHILE NAVIGATING A NARROW PASSAGE WHERE SHIPS WERE LIKELY TO BE MET, AND THAT THEREIN THE PORT OF PORTLAND WAS AT FAULT; THAT THE "OCKLAHAMA" AND TOW APPROACHED SAID PASSAGE AT FULL SPEED, AND THAT THEREIN THE PORT OF PORTLAND WAS AT FAULT; THAT THE PILOT OF THE "OCKLAHAMA," UPON RECEIVING THE FIRST WHISTLE FROM THE "THODE FAGELUND," PUT HER HELM TO STARBOARD AND FAILED TO ANSWER SAID FIRST WHISTLE OF THE "THODE FAGELUND," AND IN SO DOING WAS NEGLIGENT, AND THEREIN THE PORT OF PORTLAND WAS AT FAULT; THAT THE "OCKLAHAMA" WAS NEGLIGENTLY NAVIGATED IN THAT NO SIGNAL WAS GIVEN THAT HER ENGINES HAD BEEN PUT FULL SPEED ASTERN.

(Record Vol. I. p. 171.)

Wilhelmsen propounded among other things, the following:

For it is true, as more particularly charged in lines 6, 7 and 8 of page 17 of Article XII of said libel of said "Thielbek" that the said Turppa was in his bunk while his boat, the "Ocklahama," was navigating a narrow passage where ships were likely to be met, and it is and was as thereing stated *the fault of The Port of Portland in respect of the matters and things in said Article IV of said libel charged against this answering respondent and his ship, and it is not true, as the libelant would now have it believed, that Turppa, although in his bunk, was observant of the navigation of his vessel in a proper manner and under proper control.*

(Record Vol. 1, p. 177.)

Every ingenuity of counsel has been employed to put these vessels on crossing courses *when the signals were exchanged* but the fact is Pease came up with a starboard helm (see "pleadings" herein) and *was head on when signals were exchanged,* and this Wilhelmsen made very plain:

But the fact is that said vessels were proceeding head and head or nearly so and so nearly so that the "Thielbek" and "Ocklahama" when first seen could and should have negotiated the passage that was signaled to them and which was afterwards answered and assented to by them.

(Record Vol. I. p. 179.)

At the time of giving said signal the "Thode Fagelund" was in the clear, and this answering respondent says that the said Roy Pease, pilot on the "Ocklahama," then at that time committed a fault of navigation and that the said "Thielbek" and "Ocklahama" were faultily and negligently navigated in this, that had said Roy Pease been an experienced pilot he would have and should have given the first signal of an intention to pass, they being the lighter vessels and more easily directed and navigated, and if it be true that the said pilot Pease then put his helm to starboard and that the "Ocklahama" and "Thielbek" immediately commenced to swing to port, then it is likewise true, as in the libel against the "Thielbek" in cause No. 6111 alleged, that he did not hold his helm, for had he done so he would have cleared the "Thode Fagelund" upon the course signaled by her and assented to by the said Roy Pease.

(Record Vol. I. p. 179.)

And the court below found the fact to be, "the collision was *on a line fore and aft.*"

(Record Vol. I. p. 88 mid. of Page.)

This answering respondent says that the "Thode Fagelund" never did change her course and that it is and was as alleged in the libel in cause No. 6111, at the time of the collision and for a considerable time prior thereto, the "Thode Fagelund" had no headway, her anchor chain

was down and her propeller running full speed astern, and if it be true that the said Turppa, as alleged in the libel of the "Thielbek," although in the Texas, was awake and heard the whistles and that the said Roy Pease was navigating the "Ocklahama" properly, then they both heard, long before the collision, the alarm whistles consisting of four rapid blasts, given twice at intervals as provided by the inland navigation rules and were thereby aware of the position of the "Thode Fagelund," and it is not true that she changed or altered her course in the direction of the "Ocklahama" and tow; that it is not true that the "Thode Fagelund" continued to alter her course as alleged in said libel more and more to her own starboard side, but the fact is that just a short interval of time before the collision, and while the "Thode Fagelund" was stopping and her anchor down and was swinging with the motion of her wheel so that the red light may have come into view, **the "Ocklahama" never altered her course, but navigated the "Thielbek" and herself directly into the port bow of the "Thode Fagelund" at a high rate of speed and in the manner as alleged in the libel in cause number 6111 and so that the "Ocklahama" broke her hawsers and ran up alongside the "Thode Fagelund" to about a midship position.**

Record Vol. I. pp. 180-1.)

Wilhelmsen further propounded:

And in pursuance of Section 4487 of Revised

Statutes of the United States, it is now propounded and shown that in Article XII of said libel, page 17 thereof, and to that extent and for a more full answer to the allegations of said libel, this answering respondent says that Knohr & Burchard, the libelants, allege:

(Lines 4 to 17, page 17, libel in cause No. 6116, Article XII.)

> "Especially allege that the "Ocklahama" was left in charge of a young and inexperienced pilot, and that her master was in his bunk while nagivating a narrow passage where ships were likely to be met, and that therein The Port of Portland was at fault; that the "Ocklahama" and tow approached said passage at full speed, and that therein The Port of Portland was at fault; that the pilot of the "Ocklahama," upon receiving the first whistle from the "Thode Fagelund," put her helm to starboard and failed to answer said first whistle of the "Thode Fagelund," and in so doing was negligent, and therein The Port of Portand was at fault; that the "Ocklahama" was negligently navigated in that no signal was given that her engines had been put full speed astern."

And these being the facts as so charged, then it cannot be true that the "Ocklahama" did the things which are alleged in paragraph VI of said libel, and so, without further answering, respondent says that the circumstances and occur-

rences propounded in said Article VI did not occur or come about by anything that was done by the "Thode Fagelund."

Record, Vol. I. Page 182.)

It is denied that the navigation of the "Thode Fagelund" was in the charge of M. B. Hansen, master of the "Thode Fagelund," for the fact is that the navigation of said "Thode Fagelund" **was solely and only in charge of Michael Nolan, one of the pilots in the employ of The Port of Portland, and that said Michael Nolan had been furnished by The Port of Portland to take the said "Thode Fagelund" to sea, and this answering respondent says that if there is any negligence or fault of navigation attributable to the "Thode Fagelund" that the responsibility therefor lays with The Port of Portland.**

(Record, Vol. I. Page 183.)

And to join with the libel of the said "Thielbek" in cause number 6116 against The Port of Portand, propounds and articulates and says it is true as in said libel charged, namely:

(a) That the "Ocklahama" was left in charge of a young and inexperienced pilot, to-wit, Roy Pease;

(b) That her master, Isaac Turppa, was in his bunk while his vessel was navigating a narrow passage where ships were likely to be met;

(c) That the "Ocklahama" and "Thielbek" approached the narrow passage between the

stern of the dredge "Chinook" and the Astoria docks, wherein the "Thode Fagelund" then was, at full speed and without reducing speed;

(d) That the said Roy Pease, the pilot of the "Ocklahama," upon receiving the first whistle from the "Thode Fagelund," failed to answer;

(e) That the "Ocklahama" did not signal at any time that her engines were full or half speed astern;

(f) That the "Ocklahama' 'did not signal at any time otherwise than to give her assent to a starboard passage; **and that in each of said particulars The Port of Portland was at fault, and of the matters herein propounded this answering respondent craves consideration of your honors reserving the right to amend his libel at first instance in conformity thereto.**

(Record, Vol. I. pp. 185 and 186.)

And this answering respondent here reiterates and alleges as part of his answer hereto all the matters and things in his libel in cause number 6111 hereinbefore referred to and on file in this Court as fully and completely as if the same had been filed in this cause and to the end that this Court may here consider this case, make complete investigation and have full consideration of the same and all of the facts therein propounded.

(Record, p. 187, Vol. I.)

Whether the cause at first instance upon either libel or the consolidation cause is made issuable and triable in this Court upon the theory of vessels approaching head and head or nearly so, or whether it should be upon that other and different claim that the vessels involved were approaching upon diagonal courses, this respondent propounds and says, as part of his answer here to, that in any or either event and regardless of how the issue is made up, the "Thode Fagelund" was in fact the burdened vessel, for that she was heavily laden and known by those operating the "Thielbek" and "Ocklahama" to be upon her way to sea and seen by the "Thielbek," as they allege and propound, long before there was any danger of a collision, and at said times the "Thode Fagelund" with the conditions of the dredge "Chinook" then in the channel and from her anchorage being compelled to execute a maneuver around or by the stern thereof, all of which was well known to the "Thielbek" and "Ocklahama,"

* * * * * * * * * * * * *

reference being had to Rule XI and Article 27 of the Pilot and Sailing Rules, approved by the Acts of Congress.

(Record, Vol. I. pp. 187-188.)

The Port of Portland admitted that the allegations of Wilhelmsen were true on the subject of laden vessel and intended movements:

This respondent admits that the respondent

knew that the "Thode Feguland" had been laden at Portland with a full cargo and that being so laden and having duly cleared, was leaving the port of Portland to arrive off the port of Astoria so that she might come to an anchorage off the dock or wharf of the Oregon-Washington Railroad & Navigation Company in the channelway and avail of the outgoing flood tide on the morning of Sunday for her voyage upon the high seas. (Vol. I, Record, p. 45.)

It was the contention of the libellants, Grace and Dupont, the cargo owners, that they had respectively been damaged *by the negligent navigation of the "Thielbek" and "Ocklahama"* (Record, Vol. 1, p. 295), but no charge was made by either of them against the *"Thode Fagelund"* or its owner Wilhelmsen.

(c) *Theory of trial and issue presented:*

The theory upon which the pleadings were framed, the evidence presented, the arguments made and the causes consolidated and considered in the court below was—that there was a maritime tort committed by The Port of Portland (i) either by its tug boat "Ocklahama" or (ii) by its pilots, Pease and Nolan, through negligent and careless navigation causing a collision resulting in damage civil and maritime to both ships involved, and the cargo of one of them.

The proceedings were not at any time grounded upon the claim, nor was it conceded by any one of the four libelants, that any state, however sovereign, could create an instrumentality superior in right, or preferred in remedy or limited as to liability against the laws of the United States and the exclusive plenary jurisdiction of the federal courts in matters of admiralty and maritime jurisdiction.

The Port of Portland apparently seeks to set aside well settled rules of law and graft upon the admiralty and maritime jurisdiction of the United States a new and independent theory of limited liability, notwithstanding that Congress itself has legislated thereon and the decisions of the courts of the United States are uniformly against its contentions.

(d) *The decrees and their dates of rendition:*

Arising out of this collision were the following causes:

No. 6111, Wilhelm Wilhelmsen v. "Thielbek" and Port of Portland. August 30, 1913.

No. 6116, Knohr and Burchard v. "Thode Fagelund" and Port of Portland. September 13, 1913.

No. 6129, W. R. Grace & Co. v. "Thielbek" and Port of Portland. October 9, 1913.

No. 6130, Dupont v. "Thielbek" and Port of Portland. October 9, 1913.

No. 6139, Petition of Knohr and Burchard to limit liability. October 16, 1913.

On September 8th, 1914, a consolidation order was entered.

(Record, Vol. I, p. 4.)

November 16th, 1914, the court filed its opinion upon the evidence submitted in the causes thus tried.

(Record, Vol. I, pp. 85-94.)

From this has resulted one of the strangest anomalies in admiralty procedure:

On November 18, 1914, said libelant filed in said cause a motion for decree in accordance with the said opinion. On December 7, 1914, *this cause was heard* by the Court before the Honorable R. S. Bean, District Judge, upon the form of decree. On December 14, 1914, *said Court filed an opinion settling the decree* to be entered in this cause, said opinion being entitled in this cause and also in cause No. 6111, *and was filed in cause No. 6111.* On December 15, 1914, objections were filed by said claimant to the form of decree applied for. Thereafter, on December 15, 1914, *there was entered in said cause an interlocutory decree* awarding damages to the said libelant, together with interest and costs, and thereafter, on May 31, 1915, this cause came

on for further trial by the Court before the Honorable Robert S. Bean, District Judge, as to the amount of damages sustained by the libelant, and thereafter, on June 14, 1915, the Court determined the amount of damages suffered by said libelant *and filed in said cause its opinion* and directed a decree to be prepared in accordance with said opinion, and on said date said libelant submitted a form of decree, and on June 15, 1915, objections to the said proposed form of decree were filed by the said claimant. Thereafter, on June 22, 1915, said claimant filed in said cause objections to the form of decree. *Thereafter, on June 24, 1915, a final decree was duly entered in said cause in favor of the said libelant and against the steamer* "Thode Fagelund" and The Port of Portland and either of them for the sum of $12,805.26, together with interest thereon from October 20, 1913, until paid, and costs to be taxed. Thereafter, on June 29, 1915, said claimant filed *in said cause a motion to vacate said decree, and thereafter said motion came on* to be heard by the Court before the Honorable R. S. Bean, District Judge, and on July 19, 1915, an order was entered denying said motion.

Record, Vol. I, pp. 10 and 11.)

(e) *The appeals and their relation to each original case:*

Wilhelmsen was thereupon forced to appeal, and notwithstanding the causes were consolidated, considered and submitted together, yet the Court permitted, over the objections of Wilhelmsen as thus shown, the entry of a decree in favor of the *"Thielbek,"* and the rest of the same subject matter was not determined until the following September and October of 1915.

On July 7th The Port of Portland having appealed, Wilhelmsen on July 21st, 1915, appealed from the decree entered against him June 24th, 1915, in Cause 6116 in favor of the owners of the "Thielbek," and filed his necessary papers on appeal.

Record, Vol. I, pp. 11 and 12.)

On September 29th and 30th, 1915, Wilhelmsen's original Cause 6111 passed to an opinion, together with Causes 6129 and 6130, upon the right of recovery and question of damages, and the court dismissed the libels of Grace and Dupont and allowed Wilhelmsen his damages in the sum of forty-three thousand eight hundred four and 65-100 dollars ($43,804.65,) October 25th, 1915.

(Record, Vol. I, pp. 119-125.)

On October 25th, 1915, a decree for Wilhelmsen was signed and entered, in Cause No. 6111, *the original cause.*

(Record, Vol. 1, pp. 126-127.)

No appeals had been prosecuted by Grace and Dupont in Causes 6129 and 6130, and the appeal had already been prosecuted in Cause 6116, as above noted, before the opinion and decree of October 25th, 1915, were given and entered.

Nevertheless, on October 25th, 1915, on the *exparte* application of The Port of Portland and without notice, the court undertook to enter an order and did enter an order consolidating *all of the causes for purposes of appeal.*

(Record, Vol. I, p. 129.)

On the 9th and 16th of November, 1915, thereafter, The Port of Portland filed its papers on appeal in Cause 6111, *the original cause,* at first instance.

(Record, Vol. I, pp 129-134.)

On the 27th day of November, 1915, following came Knohr and Burchard and made their motion for a final decree in Cause 6111, and final decree, (with a large number of other proceedings were had over the objections of Wilhelmsen at that time), was entered on January 3rd, 1916, dismissing the libel of Wilhelm Wilhelmsen against the *"Thielbek"* and taxing costs to Wilhelmsen in the sum of twenty-two hundred forty-seven and 93-100 ($2247.93) dollars, in

favor of Knohr and Burchard, owners of *"Thielbek."*

(Record, Vol. I, pp. 136, 137 and 137 to 147.)

In the manner the cases were presented and tried, the court had no power to address itself the second time over Wilhelmsen's objections to further determinations against him after decree entered in the "Thielbek" case some months before, which afforded as the case stood then the only way Wilhelmsen could recover from The Port of Portland the sums decreed against him in favor of the "Thielbek" owners.

(f) *The case before this Court:*

The Court below refused to wholly abide by any theory presented to it by any party and adopted one of its own.

The theory of decision adopted by the Court and the method of procedure in these cases has led to the situation now presented to this Court, viz: **That on any theory of the whole case The Port of Portland is liable as the primary tort feasor.**

The tug "Ocklahama," the pilot Pease thereon and the master Turppa thereon, with the tow of the "Thielbek," constituted one element among the instrumentalities employed by The Port of Portland in bringing about the injuries complained of; the other element was its pilot Michael Nolan. The result was a collision (*a*

maritime tort), committed by an offending thing engaged in navigation. The consequence was damage and injury to both vessels.

Unhappily for reasons seemingly directly contrary to uncontradicted and *without conflicting evidence* the trial Court dismisses all considerations of negligent navigation upon the part of the "Ocklahama," its pilot and captain, although charged to it by all of the parties, save and except The Port of Portland.

For a like unknown reason, the trial Court mulcts the owner of the "Thode Fagelund" in all of the damages sustained by the "Thielbek" for the negligence of The Port of Portland's pilot.

THIS APPEAL PRESENTS THE QUESTION THAT THE ACTS OF PEASE, THE PILOT OF THE "OCKLAHAMA," AND THE NEGLIGENT NAVIGATION OF THE "OCKLAHAMA" WAS THE ACTUAL CAUSE OF THE COLLISION AND THAT IN EITHER EVENT, WHETHER NOLAN WAS NEGLIGENT, AS THE COURT FOUND, OR WHETHER PEASE WAS NEGLIGENT, AS THE COURT OUGHT TO HAVE FOUND, THE LIABILITY RESTS WITH THE PORT OF PORTLAND AS TO BOTH VESSELS.

THE EVIDENCE.

Next following is given portions of the uncontradicted testimony of witnesses in respect of whose testimony there is no conflict:

BERGMANN, master of the "Thielbek," testified as follows:

Q. Do you know who the captain of the "Ocklahama" is?

A. Yes.

Q. What is his name?

A. Turppa.

Q. Captain Turppa?

A. Captain Turppa, yes, sir.

Q. Who was the pilot?

A. Pease.

Q. Where were you lying when you made fast?

A. It was about four miles west from Astoria.

Q. Near the Young River?

A. Near Young River.

(Record, Vol. I, p. 305.)

Q. Did you take these observations you have testified about from the forecastle head or from the aft part of your ship?

A. From the fo'castle-head.

Q. At the time you made these observations she was then attached to and a part of the "Thode Fagelund"?

A. Yes.

Q. So the position you place your ship in was also the position of the "Fagelund?"

A. Yes.

Q. You think that was about 150 feet over your port bow from the dredge?

A. Yes, the stern.

Q. Over the port bow 150 feet and 350 feet to the dock?

A. Yes.

Q. That would make 500 feet?

A. Yes, sir.

(Record, Vol. I, pp. 316-317.)

Q. Then you must think the dredge "Chinook" took up about a thousand feet of that channel. Is that right?

A. No.

Q. How much room did that dredge "Chinook" take up that morning?

A. I don't understand.

Q. Let me put it this way: Suppose you had been navigating your ship yourself from your position on the forecastle-head. *Was there room for you to go by on either side between the dredge or the dock and the "Thode Fagelund"? Plenty of room?*

A. *Oh, yes.*

(Vol. I, Record, p. 317.)

Q. In order that we may know how you found that to be all right, tell us how the tug was fastened?

A. It was fastened by the stern on the port side.

Q. On the port quarter of your ship?

A. Yes, sir.

(Record, Vol. I, p. 323.)

Q. I understood you to say that when you struck the "Fagelund" that the "Ocklahama" tore all that tow-line loose?

A. Yes, that is it.

(Record, Vol. I, p. 325.)

WILLIAM EGGARS, the Mate, called as a witness for the libelants, having been duly sworn, testified as follows:

Questions by Mr. Wood:

Q. What is your name?

A. William Eggars.

Q. You are the First Officer of the "Thielbek"?

A. Yes, sir.

(Record, Vol. I, p. 359.)

Q. Then what next did you see in the way of lights indicating a vessel?

A. I saw a light coming up forward, two mast-head lights and a green light.

Q. And what relation were they to your course, which side of it?

A. I just see the green light coming up; she showed just clear from our ship on the starboard side.

Q. (Mr. Bristol) She showed from your ship on the starboard side?

A. Yes.

Q. (Mr. Bristol) Starboard side?

A. Yes, I had been standing on the starboard side high up on the poop.

Q. Over against the rail of your ship?

A. Yes, sir.

Q. (Mr. Bristol.) The starboard side of your ship?

A. Yes, sir.

Q. This green light and those two mast lights seemed to be practically just ahead of you?

A. Yes.

Q. Except it was only showing the green light?

A. Yes, it was just clear from our bow.

(Record, Vol. I, pp. 364-365.)

Q. Now, then, when you saw this green light on the approaching steamer, what relation was it in line between you and the "Chinook"; what relation to the "Chinook," we will say, on a line drawn from you to the green light?

A. I couldn't see the "Chinook" from the starboard side at all; she was on the port side.

Q. You saw the green light clear of the "Chinook"?

A. Yes.

(Record, Vol. I, p. 367.)

Q. Did you hear any whistle?

A. Yes, sir.

Q. From what vessel?

A. AS SOON AS I SEEN THE GREEN LIGHT I HEARD TWO WHISTLES BLOWING FROM THE STEAMBOAT AHEAD.

Q. AS SOON AS YOU SAW THE GREEN LIGHT?

A. TEN OR TWENTY SECONDS AFTER.

Q. SHE BLEW TWO WHISTLES?

A. YES, SIR.

Q. DID THE "OCKLAHAMA" ANSWER?

A. NO.

Q. THEN WHAT HAPPENED?

A. He rung down to his engine and stopped his engine, THE "OCKLAHAMA," BUT DIDN'T ANSWER THE WHISTLE.

Q. Did he stop the engine and back, or just stop it?

A. He stopped it.

Q. Were there any other whistles?

A. No.

(Record, Vol. I, p. 368.)

Q. Was the "Ocklahama" torn loose from her lines by the collision?

A. Yes.

Q. What lines did she have out on the "Thielbek"? Describe them.

A. She had two stern-lines, a head-line and two breast-lines.

Q. Five altogether?

A. Yes, sir.

Q. Describe what they were in way of their weight and strength; whether hemp or steel or manilla.

A. I don't know what it was.

Q. You don't know what they were composed of?

A. No, only that they were of wire and rope.

Q. Where were they made fast to the "Thielbek."?

A. Two over the stern, made fast on the poop; one aft, just before the poop, amidships, and one goes forward about to the main-mast, and one was over to the mizzen-mast on the rail —on the stanchion.

(Record, Vol. I, p. 370.)

Q. Now, at the time of the collision, where were you in relation to the "Chinook"; was she on your port?

A. She was on the port side; we was close to the stern of the "Chinook," about 150 feet off.

(Record, Vol. I, p. 372.)

Q. Now, then, if I understand, this is your poop-rail and this is your bulwark-rail (indicating with pencils and a knife on table). If I looked athwart your ship, there would be the wheel-house of the "Ocklahama" to my right hand?

A. Yes, sir.

Q. Not more than an eighth of a point ahead of that line?

A. Yes, sir.

Q. AND YOU DIDN'T CHANGE FROM THAT POSITION ALL THE TIME TO THE HAPPENING OF THE ACCIDENT?

A. NO, I ALWAYS STOOD THERE.

Q. ALL OF THE THINGS YOU HAVE TOLD COLONEL WOOD YOU SAW, ALL OF THE LINES YOU SAW, AND WHAT YOU HEARD, WERE SEEN AND HEARD BY YOU FROM THAT POSITION AND NO OTHER?

A. YES, SIR.

Q. IS THAT CORRECT?

A. YES, THAT IS CORRECT.

(Record, Vol. I, p. 378.)

Q. In other words, so far as you could see from where you were, as a navigator, there was plenty of room for you to have negotiated a passage on either side, wasn't there, and get through?

A. There wasn't much room, but room enough for passing.

Q. *If you had been a close navigator you could have gone through on either side?*

A. *Yes.*

Q. *That was true during all the time you came up the river after she got clear of the dredge, wasn't it?*

A. *Yes, sir.*

(Record, Vol. I, p. 386, 387.)

Questions by Mr. Minor:

Q. Mr. Eggars, how was the "Thielbek" swinging before the collision?

A. She was going easy to the port.

Q. How long had she been going in that course?

A. She was going that way a short time before we heard the two whistles of the steamboat, easy to the port.

Q. Did she change her course after the whistle?

A. Yes, she was going more to the port after we heard the two whistles.

Q. After she took that new course, did she change the course at all?

A. Yes, he changed the course and let her go easy as far as she could go and then held her up a bit.

Q. Before the two whistles blew, how was the "Thielbek" swinging?

A. Easy to the port.

(Record, Vol. I, p. 387, 388.)

QUESTIONS BY MR. WOOD:

Q. Mr. Eggars, Mr. Minor asked you a question about the "Thielbek" and the "Ocklahama" being on an easy port-swing. Do I understand that was all the way coming up the river, or only at the time of the first whistle of the "Fagelund"?

In other words, when did you take the port-swing?

A. We took the port-swing shortly before the two whistles came.

Q. Before the two whistles?

A. Before the two whistles we were going easy to the port; after the two whistles we were going more.

Q. Going more to the port after the first two whistles of the "Fagelund"?

A. Yes, sir.

Q. Then did he make any further change to port?

A. Yes, she was going easy all the time the whole way along.

(Record, Vol. I, p. 396, 397.)

HERMAN OEHRING, called as a witness for the libelants, being duly sworn, testified as follows:

Questions by Mr. Wood:

Q. When did you first see any lights indicating vessels ahead?

A. I was on the forecastle-head and looked out.

Q. *How long after you had been in motion, going?*

A. *About fifteen to twenty minutes.*

Q. In what relation were you at that time to any point on the Astoria shore? Have you got any point you could say you were opposite?

A. *A little time before I went on the forecastle-head we passed a red light ashore. I noticed that.*

Q. That was a little time after you came on the forecastle-head?

A. While I was going up to the forecastle-head I noticed it.

Q. When did you go on the forecastle-head? *How long had you been running before you went there?*

A. *Fifteen to twenty minutes.*

Q. What lights did you see ahead?

A. I see a ship lying at anchor; the anchor-lights on the ship.

Q. Where were you?

A. On the forecastle-head then.

(Record, Vol. I, p. 407.)

Q. How far off the "Thielbek" was the "Chinook"?

A. About 150 to 200 feet.

(Record, Vol. I, p. 411.)

The record discloses at pages 421 to 439, inclusive, the most astonishing testimony from the lookout GERHART GERDES, who testified that he didn't see any red light ashore (record p. 428) and he saw no steamer lights and in fact he did not see much of anything (record pages 433 to 435.)

CAPTAIN I. TURPPA, a witness called on behalf of Knohr & Burchard, being first duly sworn, testified as follows:

Direct examination, questions by Mr. Wood:

Q. Captain, what whistles did you hear, if any, prior to the collision?

A. I heard two whistles.

Q. From what boat?

A. I took it to be the "Thode Fagelund." She has been here several different times and I knew her whistles, and the night before, I came down that vessel and the "Thode Fagelund" overtook us and I have heard her whistle so many times I recognized her, although I was half asleep.

(Record, Vol. I, p. 678.)

Q. Can you tell at what time you heard the bell to back, relating to the time you heard the whistle of the "Thode Fagelund"?

A. Well, I couldn't say how long it was, after the "Thode Fagelund" had blown her second whistle, and we had answered her second whistle. I won't say. I won't state no length of time.

Q. Did you drop asleep at all after you heard the whistle from the "Ocklahama" up to the time of the collision?

A. Well, I was half asleep; half asleep and half awake at all the time, but I wouldn't—many a time when I meet the vessels on the river, we

slow down, and sometimes we stop. Now, the swells of some boats, it makes it necessary for us to do this, in order to stop our lines carrying away, and I don't think nothing more about it than just something of that kind. He just slowed down the speed, probably he was afraid of a swell.

(Record, Vol. I, p. 689, 690.)

Q. Now, what was the condition of the tow lines of the "Ocklahama" that night?

A. We had a wire towline, inch wire.

Q. How many lines was the "Thielbek" lashed to the "Ocklahama" with?

A. We had two stern lines, two breast lines, one tow line and one head line.

Q. Tell the Court about what were the sizes and nature or material of these lines?

A. Our manilla lines are seven inch lines. Head line, breast lines and stern lines, and then they have a wire pennant on the end of each one of them, probably it was five or six fathoms of wire. I think it is three-quarters, either five-eighths or three-quarter wires; wire pennants on the end of each one of them.

Q. And your tow line is how large?

A. Our tow line is an inch wire.

Q. Inch wire?

A. Yes, sir.

Q. These manila lines, as I understand, you

measure by circumference, seven inches being seven inches in circumference?

A. Yes, sir.

Q. WERE YOUR LINES PARTED?

A. YES, THE LINES WERE PARTED. When I went out to the pilot house, the head line was still intact.

Q. The head line was intact, and the others were parted?

A. Yes.

Q. And at what place on the lines were they parted? Do you remember?

A. Different places; some very close to that wire pennant, and some further away. I couldn't positively state now.

(Record, Vol. I, p. 692.)

Q. But what I mean, Captain, if you were in doubt as to her position, because of the manner in which the range lights appeared to you, and the fact that she was beyond the "Chinook" from you, what, in your judgment, would you have done?

A. I don't know as I have any reasons to be in doubt if I see her green light, and she blows me two whistles. I don't see any reason why I should be in doubt to blow her two whistles.

(Record, Vol. I, p. 697.)

Q. You know the "Thielbek," and you know the "Ocklahama." In what space can the "Ocklahama," going full speed astern, stop the "Thielbek," if the "Thielbek" and the "Ocklahama," at

the time when you undertook to back, were proceeding at a speed of about six miles an hour?

Mr. BRISTOL: As to that I object, because there is no evidence that the "Thielbek" and the

(Record, Vol. I, p. 699.)

"Ocklahama" were then, or at any time, proceeding at six miles an hour.

Mr. MINOR: That is an allegation of the libel, your Honor, and I have to meet everything in the libel. The libel of Mr. Snow says that.

Q. In what distance could they stop?

A. Well, I couldn't say how many feet, or how many—but I know that I tried her here in the Portland harbor, and it took me five minutes to stop from full speed astern.

(Record, Vol. I, p. 700.)

Cross examination, questions by Mr. Snow:

Q. Captain, you were half asleep and half awake from the time you heard the first whistles of the "Ocklahama" up to the time of the collision?

A. Probably up to the time I heard those trouble distress whistles of the "Thode Fagelund."

Q. At the time you heard what you call the distress signals, and what we call the danger signals, Captain—that is what you mean by distress signals, the danger signals?

A. Yes, sir.

Q. Repeated short blasts of the whistle?

A. Yes, sir.

Q. You were half asleep from the time you heard the first whistle of the "Fagelund" up to the time you heard the danger signals?

A. I was awake enough all the time; I knew we were meeting the "Thode," and I knew—when I was at the dock the night before, I heard something about the pilot going aboard the "Thode Fagelund" and I just thought now the "Thode Fagelund" is going to sea, when I heard the whistles.

Q. When you got down the night before, you knew that the "Fagelund" was going to sea the next morning?

A. I heard it at the Astoria dock, when I was there telephoning for my orders.

Q. Now, are you able to state the time between the first two whistles of the "Thode Fagelund," and

* * * * * *

(Record, Vol. I, pp. 703, 704.)

Q. Now, if she were going at seven miles an hour at the time you heard this call for slow speed, how long would it take her after a bell to stop, to stop the momentum of the vessel, of the "Thielbek"?

A. STOP HER HEADWAY ENTIRELY?

Q. YES.

A. OH, ABOUT FIVE MINUTES, APPROXIMATELY.

Q. ABOUT FIVE MINUTES?

A. YES, ABOUT.

Q. YOU THINK IN ABOUT FIVE MINUTES, IF SHE WERE GOING AT SEVEN MILES AN HOUR, YOU COULD STOP THE VESSEL, COULD YOU?

A. I believe I could stop her. I TRIED IT HERE IN THE PORTLAND HARBOR, JUST TO SEE HOW LONG IT WOULD TAKE. IT TOOK ME FIVE MINUTES TO STOP.

COURT: At what speed?

A. WE WERE GOING AT FULL SPEED.

Q. Did you have a tow with you when you tried to stop her?

A. I had the "Thielbek."

Mr. BRISTOL: Yes, tried to stop her in the Portland harbor, he said.

COURT: You had a tow.

Mr. BRISTOL: This same ship, the "Thielbek," he told you.

COURT: This same boat in the harbor.

Mr. SNOW: Oh, I see. And were going at full speed, and stopped her in five minutes?

A. Yes.

(Record, Vol. I, pp. 713, 714.)

Q. That is your second course. The first course would be up to this light?

A. Well, we generally turn around.

Q. You come up to this light, and take that as the point of the departure?

A. Yes.

Q. Then come to the Elmore Cannery light?

A. Outside of that.

Q. Outside, but keep in the fairway out here?

A. Yes, sir.

Q. And then run from the Elmore light to this flash-light buoy?

A. No, I generally steer so as to reach way up here, thousands of lights here, but generally the street line, two lights in a line, I generally steer by, and come up about abreast of Callender dock, and commence to haul up the river.

Q. You really don't take any bearing on flashlight buoy No. 2?

A. No. I don't generally go up in there. I steer right in the middle of the channel. That is the reason I take this street line up here, because I can get in the middle.

Q. In the middle of the fairway?

A. Yes.

Q. Your natural way, if you had been taking the "Thielbek," and I presume that is the way she was going that night—I am assuming if you had it you would take the point of departure from this red post light, and then steer for the Elmore Cannery dock?

A. Yes, sir.

Q. Then go from there on the range for these arclights up the hill?

A. Yes.

Q. And when you get off here by Callender dock, would set up for Tongue Point?

A. Would make a kind of a swing with the ship; we don't swing fast.

(Record, Vol II, pp. 740, 741.)

Q. When you came down that night, did you go between the Gilman Light and the "Thode," having the "Thode" on your starboard hand, or on your port hand?

A. As near as I can recall, I did.

Q. You had the "Thode" on the starboard side coming down?

A. Yes, had her on the starboard, my right-hand side going down.

(Record, Vol. II, p. 753.)

H. F. CAMPION, a witness called on behalf of the Libelant Wilhelmsen, being first duly sworn, testified as follows:

Direct examination, questions by Mr. Bristol:

Q. Mr. Campion, what is your business?

A. Superintendent towage and pilotage for The Port of Portland.

(Record, Vol. II, p. 1004.)

Q. That is to say, what I want to get at now, —just follow me and we won't misunderstand each other—this paper that you have shown me

called The Port of Portland Tariff No. 1 was the document that you had in use applying to all towage services in 1913, was it?

A. Yes, sir.

Q. And wasn't any other?

A. No.

Q. That applied in August, 1913?

A. No.

Q. And it would be accurate for us all to take these as the Rules and Reguations of the towage and pilot rates and dry dock rates, and that sort of thing, as shown in this paper, as obtaining of the time when we reached the date of August 23rd and 24th, 1913?

(Record, Vol. II, p. 1008.)

A. Yes, particularly the pilotage and towage. I don't have so much to do with the dry dock, but I think that is the same tariff.

Q. And if there were any changes?

A. I don't know of any changes, only what I have put here.

Q. In pen and ink?

A. Yes.

Q. And you made those notations when? Lately?

A. I made them since April 30, 1914.

Q. Since April 13, 1914. So there were no changes in this paper up to the time—the date of August, 1913?

A. No.

(Record, Vol. II, p. 1009)

Q. Now, as to the entries in that log, the same is true, is it not, with reference to your getting the particulars of the accident?

A. Yes.

Q. That is, you had to rely upon your captain's report, Libelant's Exhibit 11, which you saw before?

A. Yes, sir.

Q. How did you find out, in this Casualty Report,—did the first you knew of the item, "All the steamer 'Ocklahama' lines carried away, consisting of one wire tow line, one rope head line, two rope breast lines, and three rope stern lines" —was the first you knew of it only after the Casualty Report came to you, or did you know it from anyone on board ship?

A. No, I took it—as soon as I had a chance to talk with the crew, I found out that their lines carried away. I talked to the pilot, and talked with the captain probably before that report was actually made out.

Q. Probably before. Did you give any directions as to how this Casualty Report was made out?

A. Nothing more than to ask for a casualty report in detail, covering the accident, the collision.

Q. And in connection with that, this statement made by Mr. Archie L. Pease, Jr., pilot steamer "Ocklahama," which is a part of this

exhibit, I believe you said was the report you received from him at that time?

A. Yes, sir.

(Record, Vol. II, p. 1061, 1062.)

Q. Showing you the book, on page 2, again for identification, I read to you: **Foreword. The Port of Portland Commission, in presenting this brochure to the shipowning public, has endeavored to give only facts obtained from the most reliable sources, together with exact data relating to this port's conditions and charges."**

A. Yes, sir.

Q. Is that right? That is the way it was issued, wasn't it?

A. Yes, sir.

Q. Now, do you know whether that book was put out—it also has in it the towage and pilotage rates, and some other stuff—do you know whether that book was put out generally by The Port of Portland for the ship owning public?

A. I think it was.

Mr. BRISTOL: I offer this in evidence.

Marked "Libelant Wilhelmsen's Exhibit 13 (Campion.)"

(Forward and Shipping Directions from Wilhelmsen's Exhibit 13.)

FOREWORD.

The Port of Portland Commission in presenting this brochure to the ship owning public, has endeavored to give only facts obtained from the most reliable sources, together with exact data relating to this port's conditions and charges.

Any more information required regarding shipping matters or commercial conditions of this sec-

(Record, Vol. II, p. 1071.)

tion will be cheerfully supplied upon application, either to The Port of Portland Commission, City Hall, Portland, Oregon, or the Portland Chamber of Commerce, Fifth and Oak Streets, Portland, Oregon.

THE PORT OF PORTLAND.

Portland, Oregon, U. S. A., Jan. 1, 1912.

THE PORT OF PORTLAND.

The intent of the law incorporating The Port of Portland is, to maintain a deep, safe channel, for the largest vessels, from Portland to the sea, and to cheapen port charges.

The Commission has, by the various acts of the State Legislature, been authorized as follows:

First. To build and operate dredges and dredge machinery, and build dykes, for the improvement of the harbor and of the ship channel between Portland and the sea.

Second. To inaugurate and maintain a towage and pilotage service between Portland and the sea.

Third. To build and operate a dry dock.

Fourth. To establish rules and regulations for the navigation of the harbor, and of the Willamette and Columbia Rivers between Portland and the sea.

Fifth. To sell bonds and levy taxes for the carrying out of the various objects named above.

(Record, Vol. II, p. 1072.)

As to Turppa's responsibility, Campion testifies:

Q. I am not speaking about the fact as to his being off watch. I am talking about this rule you gave me, which was, you looked to the captain as the responsible person to look after the tug and tow. Now, is that true, and if true, was it true on this particular night?

A. Well, yes, we always—

Q. All right. That is all.

Mr. MINOR: You always what? Finish your answer.

COURT: Go ahead and finish.

Mr. BRISTOL: Yes, finish it.

A. You walked right away, so I didn't want to talk while you were going.

Mr. BRISTOL: Go ahead and finish, if you have more to say. I understood you answered the question.

A. I will go back and say we hold the captain responsible all the time.

Q. That is all I want to get at.

(Record, Vol. II, p. 1098.)

Q. Turppa was mate, as I understood you to say until some time in April, 1913, mate on the "Ocklahama"?

A. Pease.

COURT: Pease.

Q. I understood him to say that until some time about April, 1913, Turppa was mate, and somebody else was captain, and he left in April, 1913.

A. I said Captain McNally was master of the "Ocklahama."

Q. About some time in April, 1913?

Mr. BRISTOL: And Turppa was pilot?

A. And Captain McNally asked for a lay-off.

Q. And Turppa was pilot?

A. Turppa was pilot.

Q. And at that time, while those two men were in charge, was Pease on the "Ocklahama"?

A. Yes.

Q. In what capacity?

A. Mate. Turppa then went captain, and Pease went pilot. Then Captain McNally, the last day, I believe, of April, left the service entirely, and Captain Turppa went from pilot to master, and Mr. Pease went from mate to pilot. That is, he had been pilot for a few days.

Mr. SNOW: That is April, 1913?

A. 1913.

(Record, Vol. II, p. 1105.)

Q. I will ask one more question. As a matter of fact, your charges for pilotage of the "Thode Fagelund," were based upon her tonnage register, and her draught?

A. Yes, sir.

Q. Exceeding the amount that you would pay Nolan for pilotage service of that vessel?

A. Yes, sir.

Q. In other words, you make a profit off the pilotage business, don't you?

A. Well, not at the end of the year.

(Record, Vol. II, p. 1111.)

ARCHIE L. PEASE, Jr., a witness called on behalf of Libelant Wilhelmsen, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Bristol:

Q. Mr. Pease, you are the Archie Leroy Pease, Jr., that has been mentioned in this case so much since we started, are you not?

A. Archie L. Pease, Jr., yes, sir.

Q. Pilot of the 'Ocklahama"?

A. Yes, sir.

(Record, Vol. II, p. 1112.)

Q. You were mate on the "Ocklahama" with pilot's papers for about a year and a half, and then this change between McNally and Turppa took place. That was April, 1913?

A. I think it was.

Q. And since that time, you have been pilot on the "Ocklahama"?

A. Yes, sir.

(Record, Vol. II, p. 1114.)

Q. Now, the next place you started to change the course, if any, was it above or below the Callender dock?

A. Was, I should say, a little bit below.

(Record, Vol. II, p. 1128.)

See in this connection Libelant's Exhibit 14 (record page 1422.) This was the position four or five minutes after he passed Elmore light. (Record, page 1133.)

PEASE further testifies:

Q. Now, for instance, you say here "head-on collision with S. S. 'Thode Fagelund,' opposite O. R. & N. dock, 3:25 a. m."

A. Yes, sir.

(Record, Vol. II, p. 1139.)

PEASE then identifies his report to the United States Inspectors, so much thereof as is now material follows:

After I had been backing full speed for between three and four minutes *and had a great deal of the headway off the bark,* the steamer dropped her anchor and a few seconds later the steamer and the bark came together head-on, tearing a large hole in the steamer on her port

side a few feet from the bow and driving the bark's anchor through a few plates and denting a number of others on both sides of her bow.

This collision occurred at about three twenty-five in the morning abreast the O.-W. R. & N. dock.

I got the two vessels apart in about one hour and a half, and as the steamer said she needed no assistance I left her anchored there.

Respectfully,

A. L. PEASE, Jr.

Pilot Steamer "Ocklahama."

(Record, Vol. II, pp. 1146, 1147.)

Contrast this with the statement made to his owners, The Port of Portland:

After I had been backing full speed for between three and four minutes *and had most of the headway* off the bark, the steamer let go her anchor and a few seconds later the bark and the steamer came together head on.

(Signed) A. L. PEASE, Jr.,

Pilot Str. "Ocklahama."

(Record, Vol. II, p 1047.)

Afterwards Archie Leroy Pease was called as a witness on behalf of Knohr & Burchard and among other things testified as follows:

Questions by Mr. Wood:

Q. Mr. Pease, you are the Archie L. Pease, the same one that testified before, and you are usually called Roy Pease, are you not?

A. Yes, sir.

Q. What is your age?

A. Born February 10, 1886.

(Record, Vol. II, p. 1178.)

Q. What was your reason for not answering the first two whistles?

A. Well, she was coming—she was just the other side of the "Chinook." I figured that she would be out from the "Chinook" in just a matter of a few seconds. I could see the outline of the "Chinook" easily. Therefore, when she came out I would be able to see the outline of her, and I thought it was good action to wait, and see her outlines for sure, and then see whether I could pass her according to the two whistles.

Q. As she requested?

A. Yes, sir.

But as I understood you—

A. You see it was an unusual whistle. It was an unusual signal. It was a signal that shoud not have been given unless there was some reason for it with the other vessel.

(Record, Vol. II, pp. 1184, 1185.)

Q. Now, you said that the whistle that you received from the "Fagelund" was an unusual one. I would like to ask you what course you had intended to pursue, before you saw the "Thode," as you went up the river; the course you intended to follow, and why, if her whistle

was unusual, you departed from it and assented to her request.

A. Well, the course that I intended to pursue, was following the docks around, giving the vessels which were anchored there a wide berth.

Q. Giving the vessels that were anchored where?

A. Where the "Thode Fagelund" had been anchored, and where the "Chinook" was anchored. I intended to give them a wide berth. They blew me two whistles, which was an unusual whistle; evidently they had a reason for it. They should have a reason for it. Anyway, I saw that I could steer so as to give them plenty of room for their whistles, if they wanted that. I gave it to them, not knowing their reasons for wanting it, but seeing I could help them out and give them room, so they would have plenty of room to pass on that signal.

(Record, Vol. II, pp. 1188, 1189.)

Q. Now, as I understand, you saw the "Thode" before she whistled?

A. Just before she whistled.

Q. Now, that word "just"—

A. Means very shortly.

(Record, Vol. II, p. 1208.)

Q. I don't want to banter words with you, but what do you mean by "just"? I might mean that as very close, as much as a man might count twenty-five, and you might think almost instantly. What do you signify by the word "just"?

A. I looked and saw the lights, and came to the conclusion it was a vessel under way, and about that time she whistled. That is, I should say, probably from the time she whistled, and the time I saw her, was a few seconds.

(Record, Vol. II, p. 1209.)

Q. Just a moment. Now, then, I am trying to direct your mind to that testimony when you first saw the "Thode Fagelund." In that position, where you first saw her, she hadn't blown any whistles and you were approximately 150 feet off the shore line, or dock line of Astoria, heading for the Gilman Buoy. Why didn't you blow one whistle and hold your course?

A. As I said before, if I had blown the first whistle, I would have blown one whistle.

Q. Yes. Now, I want to ask you why you didn't blow that one whistle and hold your course when you had 700 feet to get through there?

A. Well, that is just a matter of—you know lots of times when we first sight a vessel, and even when we know our course, we don't always blow the whistle the minute we sight her.

Q. That may be true.

A. As I told you, it was a very short time, a matter of time while you count ten, from the time I saw her until she blew her whistles.

Q. All right. Now, in that time that you count ten, there was time for you to blow your one whistle, was there not?

A. Yes, there was time for me to blow my one whistle.

Q. All right. Now, I say why did you not do it?

A. When a man sees a vessel, he will usually count—that is he will usually wait that length of time before he blows any whistle at all.

Q. Well, is that the only reason you had for waiting?

A. I had no other reason for waiting. We were quite a distance apart, and he was off on my port side, and I knew that he was coming down, and I knew that, and the chances were he was going to swing around the stern of the "Chinook." When he comes aft the stern of the "Chinook," then would be plenty of time to give him a one whistle signal.

Q. So you waited and didn't give him the one whistle signal?

A. I didn't give him the one whistle signal at that time, no, sir, when I first sighted him.

Q. Then why do you say his whistle was wrong?

A. Because he had me on his starboard bow —I didn't say it was wrong.

Q. You say it should not have been given?

A. Unless he had a reason for it, I said.

(Record, Vol. II, pp. 1224, 1225.)

Mr. MINOR: I object to that, your Honor. That is governed entirely by the law, not by what this witness may say. The law in that re-

gard, your Honor, is different from what Mr. Bristol states it.

Mr. BRISTOL: We will argue that, your Honor.

Mr. MINOR: That is true, but what I want to say is this: The law, as I understand it, is that it is not the duty of the vessel so signaled to get out of the way of the other one. It is the duty of the other vessel to get out of the way of the one she has signaled.

Q. Very well. Let him answer the question, anyway, to see his judgment about it.

Q. (Read.)

A. Not necessarily. If when—

Q. Why not?

A. *When he blows a signal, he means that he can get by me if I hold my course, if I do nothing. I am not supposed to do anything against him, knowing that course, that is, if I answer two whistles, I am not to go to my starboard. I can hold my course, or go to my port.*

Q. You mean to tell me, as a pilot on this river, that when you meet a vessel coming downstream, and you are going up, and she first signals you with two whistles for a starboard passing, that you can hold your course?

A. Yes, sir.

Q. You state that upon your knowledge as a pilot, do you?

(Record, Vol. II, p. 1226.)

A. *I say, if I am holding a course, and a man blows me a signal, I can hold my course.*

Q. Is that the reason for saying Mr. Nolan gave you the wrong signal?

A. No, I don't think Mr. Nolan could have passed me if I had held my course, but I was willing to give him room and I gave him room.

Q. You have no other reason for saying that the two whistle signal was wrong, other than you have given, have you?

A. I don't say the signal was wrong. I said it *was an unusual signal.*

Q. Then I will put it this way to you—

Mr. SNOW: What do you mean by that?

Mr. BRISTOL: I will find out what he means if I can.

Q. Why did you answer the two whistles of the "Thode Fagelund" if it was a signal that should not have been given?

A. It was an unusual signal. I did not say that *it was a signal that should not have been given.*

Q. You tell me that the starboard to starboard *passing signal is unusual?*

A. *A starboard to starboard passing signal is unusual in passing vessels in these positions.*

Q. Why?

A. For the simple reason one vessel has to cross the bow of the other vessel.

(Record Vol. 2, p. 1227.)

Q. Now, isn't it true, Mr. Pease, and don't you know it to be a fact, that as a pilot in these waters, that the Pilot Rules practically prescribe—and in order that you may understand what I mean and not be confused, I read to you, directing your attention, in view of your answer, to Article 22 of the Pilot Rules. Have you got them?

A. I have them.

Q. You have them there, have you?

A. What page is that?

Q. On my copy it is page 9.

A. Which Article?

Q. Article—well, along there, Rule 9.

A. Yes.

Q. Article 21. Now, look at it.

A. Yes, sir.

Q. "Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

A. Yes, sir.

Q. Now, you maintain, then, as I understand it, that Mr. Nolan had no business to give you the two whistle signal, as it was up to him to keep out of your way; is that right?

A. I don't say he had no business to give them.

Q. Well, in view—

A. I say, that when the vessels were laying in that position, Mr. Nolan or I, whoever happened to give the first signal, should have given one whistle, and in the case of that position, it was Captain Nolan's place, it was the "Fagelund's"

place to keep out of my way.

Q. Well, I am putting it the other direction. I am putting it on the theory that Mr. Minor takes. He says, and stated to the Court here, that he was going to claim that you were the privileged vessel, and your testimony seems somewhat to indicate you have that idea by saying that the "Thode" should not have given the signal that she did. I have called your attention to the rule that you could rely upon in support of your point, and ask you to question why you didn't hold your course?

A. I told you because she blew two whistles.

Q. Well, suppose she did. If that was wrong, you didn't have to obey it, did you?

A. I thought she had a reason for it, or she wouldn't blow it, and I thought I would help her out, yes.

Q. Then you blew two whistles assenting to that, saying you would execute the maneuver the "Thode Fagelund" invited you to, didn't you?

A. Yes, sir.

Q. You had plenty of room to do it too, didn't you?

A. Yes, sir.

(Record Vol. 2, pp. 1228, 1229.)

Q. I read this part of it to you: Rule 7. "When two steam vessels are approaching each other at right angles, or obliquely, so as to involve risk of collision, other than when one

steam vessel is overtaking another, the steam vessel which has the other on her own port side, shall hold her course and speed."

A. Yes, sir.

Q. And continuing the rule, I will read on: "And the steam vessel which has the other on her own starboard side, shall keep out of the way of the other, by directing her course to the starboard, so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed, or stop or reverse. If, from any cause the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent, by blowing the danger signal, and both steam vessels shall be stopped and backed, if necessary, until signals for passing with safety are made and understood."

A. Yes, sir.

Q. Do you mean that you complied with that rule?

A. Not with that rule.

Q. Why not? You were approaching obliquely were you not?

A. Yes, sir.

Q. Why did you not comply with that rule?

A. For the same thing that I answered before. I got two whistles.

Q. I am talking about before you got the two whistles.

A. Before I got the two whistles, there was no whistle given.

Q. Well, why didn't you comply with that rule?

(Record Vol. 2, pp. 1233, 1234.)

A. There was no rule to comply with until the signals are given. That is—

Q. Then your attitude, as I understand it, Mr. Pease, seems to maintain that you had nothing to do until Mr. Nolan blew, and then you governed your course accordingly; is that right?

A. Or until I had blown.

Q. Why didn't you blow a whistle, if you wanted to hold your course the way you were going, and follow up around, why didn't you blow him one whistle?

A. I would have, if I had had a little more time. There is no hurry about blowing a whistle.

Q. Well, if there was no hurry about blowing a whistle, you had plenty of time, didn't you?

A. If I had thought he was going to blow two whistles, and had known the time he was going to blow them, I think I would have blown one whistle before he had a chance.

Q. You say—

A. After he blew his two whistles, I couldn't blow one whistle, without blowing the danger whistle and one whistle.

Q. But, my dear friend, you waited until he blew you two whistles, didn't you?

A. Yes, sir.

Q. If you didn't want to consent to that signal, you could have refused, under that rule, when he blew the first two whistles, couldn't you?

A. Certainly, and could have refused that on his second whistle.

Q. Why didn't you refuse that?

A. Because I considered I could pass on a starboard passing.

Q. Well, if that be true, why should not—why *wasn't it proper for the "Thode Fagelund" to give two whistles?*

A. *I guess maybe it was.*

Q. All right.

A. I didn't say it was improper. I just said it was an unusual signal.

Q. Well, there is nothing unusual about a man's signaling the course he wants to go, is there?

A. There is, in a way.

Q. Why?

A. He is supposed to give when the vessels are *in that position, a one whistle as the signal, he is supposed to give that unless he has another reason. If he has another reason he should—if he has* a reason for that other passage, it is all right. It is nothing against his signal, but as a rule, when vessels are meeting that way they usually pass on a port signal, port passing. That is why I say it was unusual. It is not—it is done.

(Record, Vol. 2, pp. 1235, 1236.)

Q. Now, in view of that rule, I would like you if you can, and I don't want to confuse you, nor do I want to be importunate to you, but tell me why it is you still say that the whistle of the "Thode Fagelund"; that is, I am speaking of a starboard passage; the whistle of the "Thode Fagelund," the two whistles, were not answered by you? Then an interval of time comes, and she blows two again, and then you assent to it--- do you still claim that signal should not have been given?

A. No, I don't say that whistle should not have been given.

Q. All right.

Mr. MINOR: He never said that, Mr. Bristol.

A. I haven't said that at any time.

Q. What is that?

A. I said that it was an unusual whistle, but it isn't a whistle that is never given. It is used; it is done that way.

Q. And Nolan did it in just the way it is done, in a number of instances, didn't he?

A. It is done that way in a number of instances, yes.

Q. And you had plenty of clear space when it was given, to have cleared the vessels either side, didn't you?

A. *Yes, sir; that is, when I saw there was room to clear and I say that there was room to clear, I answered his whistle.*

(Record Vol. 2, pp. 1239,1240.)

Q. "Shall keep out of the way of the other by directing her course to the starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse."

A. Yes, sir.

Q. Now, do you still say Nolan was wrong when he reversed?

(Record, Vol. 2, p. 1243.)

A. I say he didn't have to reverse on that rule there.

Q. You say he didn't have to reverse?

A. Yes, sir.

Q. Why?

A. The stopping and reversing of the engine that it speaks of in this rule is so he can go astern of me, and he has whistled to go ahead of me.

Q. When he reaches a point—when you reach a point as a pilot, in which there is an apparent imminent risk of collision, is it your duty to continue full speed ahead, or to stop and reverse promptly?

A. Well, it is your place to use your judgment.

Q. Then your judgment in this case was to go half speed, and then stop, and then full speed astern?

A. Yes, sir.

Q. And if Nolan executed a like movement,

he would navigate with just as much accuracy as you did, would he not?

A. No, sir.

Q. What?

A. No, sir.

Q. He wouldn't?

A. No, sir.

Q. That is what I want to get at.

A. Not necessarily—

Q. In other words, the maneuver is right for your ship, but it is wrong for his?

A. In that condition, think the chances are, yes. I would like to state the reasons for that.

(Record, Vol. 2, pp. 1244, 1245.)

Q. Don't you claim Nolan should have told you he was backing?

A. Yes, I do.

Q. You do?

A. Yes, sir.

Q. So you didn't have to tell Nolan that you were backing, but Nolan had to tell you that he was backing?

A. In fact, I am supposed to state—when your vessel is going astern, you are supposed to say—to give three whistles. I am supposed to, as well as Captain Nolan is supposed to, and another thing—

Q. But neither one of you did it in this case?

A. Neither one of us did it. *And my reason for not doing it is, of course, as it says here in*

this risks of collision, anybody is allowed to go against them if they want to. In fact, I didn't want Captain Nolen to know I was going astern.

(Record, Vol. 2, p. 1247.)

Q. Now, that was in order, as you said, to give clearance to the vessels in the harbor. What vessels did you mean?

A. I knew that the "Fagelund" and the "Chinook" were anchored there.

Q. *Were they the vessels you had in mind?*

A. *I knew they were anchored there; yes. sir.*

Q. *Those are the vessels you had in mind, are they?*

A. *Yes, sir.*

(Record, Vol. 2, p. 1249.)

Q. All right. Now, then, when she came out from behind the dredge, and she then blew her second two whistles, did she?

A. Yes, sir.

Q. And how far was she from you then?

A. Practically the same distance.

Q. A quarter of a mile?

A. Practically.

Q. Because she couldn't travel very far, of course?

A. No, sir.

Q. In that short time?

A. No, sir.

Q. What time elapsed between the first two

and the second two whistles?

A. About, I should say, a matter of twenty or thirty seconds.

(Record, Vol. 2, pp. 1257, 1258.)

Q. Now, Mr. Pease, you are a son of A. L. Pease, are you?

A. Yes, sir.

Q. And A. L. Pease is a member of The Port of Portland?

(Record, Vol. 2, p. 1263.)

Mr. SNOW: That is not exactly my question, Mr. Pease.

Q. I understood you to say to Mr. Bristol that when the two signals were given, the two whistles blown by the "Thode," which you answered, that you were under no obligation, as you understood under the rules, to change your course? That was correct?

A. In a way.

Q. Did you say that to Mr. Bristol?

A. I don't remember.

Q. Now, give your answer. What did you mean?

A. This is what I mean. Whenever we meet a vessel, we figure on giving a signal that we can get by on, if you hold your course.

Q. You mean you expected him to get by you if you held your course?

A. *No, sir; I didn't expect him to get by me. I*

knew he couldn't get by me.

(Record, Vol. 2, p. 1265.)

Q. Then you figured out, when he blew two whistles for a starboard passage, you had a right to keep your course, and he would clear you?

A. *No, I wouldn't exactly have a right to do that.*

Q. That is not what you would have us understand?

A. *I have got to avoid a collision. I am put in that position.*

Q. But you are the privileged vessel, according to your theory?

A. *Privileged vessel, yes.*

(Record, Vol. 2, p. 1266.)

RE-CROSS EXAMINATION ON BEHALF OF LIBELANT WILHELMSEN.

Questions by Mr. Bristol:

Q. Just in connection with Mr. Snow, so Mr. Minor can have it together when he starts. I show you Pilot Book Rules, page 22, fifth situation, which has a diagram on it, showing vessel approaching in the position where you had the "Thode Fagelund" that night.

A. Yes, sir.

Q. *That represents the situation in a general way when you first saw her, doesn't it?*

A. Yes, sir.

Q. And the rule in regard to that is that: "In this situation, two steam vessels are approaching each other at right angles or obliquely, in such a manner as to involve risk of collision, other than where one vessel is overtaking another. *The steam vessel which has the other on her own port side shall hold course and speed,* and the other shall keep clear by crossing astern of the steam vessel that is holding course and speed, or if necessary to do so, shall slacken her speed, or stop or reverse."

A. Yes, sir.

Q. You are familiar with that rule, aren't you?

A. *Yes, sir.*

(Record, Vol. 2, p. 1268.)

Q. *And the testimony you have given is nevertheless with that rule in your knowledge?*

A. *Yes, sir.*

Q. And you don't desire to change your statement to Mr. Snow that while there was room for you to have continued on your course in that 700 feet, and to have given one whistle—

COURT: That is the overtaking vessel.

Mr. BRISTOL: No, no, except when overtaking. It was distinguished: "Other than where one vessel is overtaking another." It has a diagram of two vessels approaching obliquely in the fifth situation.

A. *Now, that is where you are getting me on*

the hold your course proposition.

Q. No, I didn't mean to get you.

A. No, I didn't mean to get me, but that is what I have been trying here in a way. *If a one-whistle signal had been given, I should have held my course.*

Q. Now, there is no other condition. Just let's stop there.

A. Yes.

Q. There is no other condition, is there, than that, when the other fellow blows, that you can hold your course, is there?

A. Well, if I consent to it, I have got to help him out then.

Q. In other words, unless you blow first and hold your course in the fifth position—

A. I have to help him out.

Q. *And the other fellow blows first, then you are bound, under the rules, to give him clearance, aren't you?*

Mr. MINOR: I object to that as not a proper question.

Q. I am willing to argue that with you, Mr Minor, to the full extent of the law, but I am trying to get at the pilot practice now.

A. *Yes, sir; I have to give him clearance.*

(Record, Vol. 2, pp. 1269, 1270.)

CROSS EXAMINATION ON BEHALF OF THE PORT OF PORTLAND.

Questions by Mr. Minor:

Q. Yes, if you had pursued the course you had pursued up to the collision, and the "Thode" had pursued the course on which she was going at the time she gave the first or second whistle, would there have been any collision?

A. **I DON'T BELIEVE—I THINK THERE WAS PLENTY OF ROOM TO HAVE PASSED,** and given me plenty of room to have passed the "Chinook" which was anchored. **IN FACT, I WENT FURTHER THAN I WANTED TO GO. I WENT FURTHER THAN I SHOULD HAVE GONE. I WENT SO FAR THAT IT REALLY PUT ME IN A DANGEROUS POSITION WITH THE "CHINOOK,"** and if she had held her course, I believe that I wouldn't have had to go anywhere near that far, and still there would have been plenty of room to pass; **THAT WAS MY OPINION.**

(Record, Vol. 2, p. 1273.)

Q. Had you continued on the course which you were pursuing, from the time you answered the passing signal, up to the time of the collision, how far, if at all, would you have passed the stern of the "Chinook"?

A. Well, at the course that I was forced to pursue, I doubt if I would have passed the "Chinook." **IT WAS DOUBTFUL. IN FACT, HERE**

WAS THE THING: I STARTED, OF COURSE, AND HAD TO KEEP GOING LONGER THAN I EXPECTED TO HAVE TO GO. In fact—what I mean is, I was crowded. I was crowded until I had very little room, if anything. It was doubtful if I could have gotten by the "Chinook." I don't think I could have.

(Record, Vol. 2, p. 1275.)

Q. Now, when were you backing? For what purpose were you backing?

A. At the first part of the time **I was backing more to keep from going ahead so fast;** to get the headway off so the other vessel could get by me, and then after she got by me I could swing any way I wanted. I could swing to my starboard so I could be sure and clear the 'Chinook" by plenty of room.

Q. **And afterwards, what were you backing for?**

A. **Afterwards, I was backing up both to get the headway off**—to keep from running into the "Chinook" **and to get the headway off the vessel,** because **there was liable to be a collision with the other vessel at that time.**

Q. Tell me how does the "Ocklahama" steer with a tow of that kind?

A. Why, good to steer.

Q. I say how does she steer, well or otherwise?

A. Well. That is, I would like to give my statement of that. Now, like steering a sailing

vessel, sometimes we do it to tighten up our lines, or something like that. They can put their wheel hard over one way, and we put our wheel hard over the other way, and we will turn them right around.

Q. Turn them right around?

A. Yes, regardless of their wheel.

(Record, Vol. 2, pp.1276, 1277.)

Q. Now, Mr. Pease, in your judgment, if you had not collided with the "Thode Fagelund," I will *ask you whether you had so much of the headway off the "Thielbek," that in your judgment you would have been able to stop her before you reached the "Chinook"?*

A. *That is doubtful.* What I mean by that is, probably I would have, and probably I wouldn't have.

(Record, Vol. 2, p. 1278.)

Q. I understood you to tell Mr. Minor that at the point where you determined whether or not the *two-whistle passing signal could be exchanged and you did exchange it, that you think that is about a thousand feet away?*

A. *I said that before.*

Q. And then as you proceeded along, there came a time when there was just a vestige of the mast head lights commencing to change. Then they changed more—I mean the mast head lights of the "Thode"—and they changed more until finally the red light came in view. *Now, within*

that thousand feet, and within that maneuvering there, I understand you to say you could have done nothing to avoid a collision—is that right?

A. *Under the circumstances, no.*

Q. In that thousand feet, with your ship going astern, your towboat, I mean, full speed astern, you could have done nothing to have avoided that collision?

A. And protected myself, no.

(Record, p. 1293.)

Q. *But you say you couldn't have executed any manoeuver at that time, to have avoided the collision?*

A. *No, sir.*

Q. All right. If that be the case, what difference would it have made if Nolan blew you three whistles, or any other old number?

A. *That would have given me a chance to do something else I couldn't do otherwise.*

(Record, p. 1294.)

Q. *Then if Nolan blew three whistles, you would have had a chance to do something else?*

A. *I could.*

Q. Because Nolan didn't blow three whistles, you didn't have a chance to do anything else?

A. No, sir.

Q. Is that right?

A. That is right?

Q. That is your full explanation. Now, if you

want to explain that, Archie, I want you to do it.

A. Now, here. If he signaled to me when we were a good distance apart, that is, before he blew the danger signal, which I say—if the danger signal had been three whistles instead of the danger signal, it wouldn't have been time enough for me to do anything, but if he had blown three whistles when we were a reasonable distance apart, then I could not have cross signaled him, but it would have given me a reason to know he is going full speed astern and, as long as he is going full speed astern, he is going to swing to his starboard; I could arrive at it that way. I may blow a danger signal and one whistle; if you are backing up, it is causing you to go to starboard. "Will you let me go on the other side?" *And I couldn't swing and go the other side of him unless I blew the danger signal and one whistle.*

(Record, Vol. 2, p. 1295.)

Q. If the other fellow fails to understand you, or your course and intention, then he shall blow four whistles?

A. Yes, sir.

Q. *That was significant to you, wasn't it,* and did mean he didn't understand what you were doing under that rule, wasn't it?

A. *Well, yes, in a way, but—*

Q. All right. Now, then, why didn't you tell him right then and there, "Now, Nolan, this whole

thing is wrong, that you are getting me in here, and I want to get out of it?"

A. Yes.

Q. Why didn't you do that?

A. He didn't give me time from his danger signal.

Q. Then your claim is that while you were 1,000 feet, or thereabouts, apart, as you have testified, that there wasn't time for you to have executed any move whatever?

A. I say at the time of the danger signal.

Q. You told Mr. Minor you were a thousand feet apart at that time.

Mr. MINOR: He didn't say anything of the kind. I asked nothing about that. You got that thousand feet.

A. I said the danger signal was blown, and we came together a couple of seconds after.

Q. That is the last danger signal?

(Record, Vol. 2, p. 1296.)

Q. Let's get how far you were when Mr. Minor took you—

Mr. MINOR: I didn't ask about a thousand feet apart.

Mr. BRISTOL: All right. I have a very retentive memory, but I may be wrong. The testimony will show.

Q. Now, you told Mr. Minor how far you were apart, when you blew your two whistles?

A. Yes, sir.

Q. What distance was that?

A. Well, I think I said—I am not sure—I think I stated it at about a thousad feet.

(Record, p. 1297.)

Q. In other words, if you can tell me, I want to get at this: When you stopped your engines, and when you went full speed astern, how far were you off that "Thode Fagelund"?

A. Well, I should say maybe about in the vicinity of 700 feet.

Q. And you were going full speed astern at that time?

A. Yes, sir.

Q. And saw her green light then, close in to you?

A. The "Fagelund's" green light?

Q. Yes.

A. It was visible to me.

Q. At that time?

A. Yes, sir.

Q. And you were backing full speed astern at a distance of 700 feet?

A. Yes, sir.

Q. And the "Thode Fagelund's" red light had not yet come into your view?

A. It had not.

Q. Why was it, then, that you couldn't get by her?

Mr. WOOD: On which side?

Mr. BRISTOL: I don't care. Any old side. Let him state.

A. I couldn't get by her—well, at that time—

Q. You were going full speed astern?

A. (Continuing): If she had gone in the position that she was lying in then, I could have gotten by.

Q. Why didn't you right then and there bring the head of your ship up to starboard when you were backing at full speed, swing her to starboard, and slide around the end of the "Thode Fagelund" in the other way? You had 700 feet, you say, to go in?

A. Yes, sir.

Q. Why didn't you do that?

A. Supposing I had done that, and there had been trouble, I say, and protect myself.

Q. Suppose you did do that, was it impossible for you to do it?

A. No.

(Record, Vol. 2, pp. 1298, 1299.)

W. R. ECKHART, a witness called on behalf of Knohr & Buchard, being first duly sworn, testified as follows:

Direct examination, questions by Mr. Wood:

Q. What position did you hold on the "Ocklahama" on the night of the collision with the "Thode Fagelund"?

A. Watchman.

(Record, p. 1301.)

Q. *What did he do with his engines after he had answered the "Thode Fagelund" two whistles with two whistles?*

A. *He stopped and backed full speed.*

Q. I thought you said he had stopped his engines before the second two whistles.

A. He slowed her down before.

Q. Then as I understand it, he slowed down between the two whistles of the "Thode Fagelund"?

A. I don't know exactly whether it was before or between.

Q. At the time that he received these second two whistles from the "Thode Fagelund," and gave an answer, and swung his boat more to port, as you have described, what was the course of your boat then, in relation to the dredge "Chinook"? How were you headed?

A. We were heading about for the stern of the "Chinook."

Q. Did you vary from that course? Did you change that course up to the time of the collision?

A. I don't think he did.

A. Were you watching.

A. Well, I was watching.

Q. If he did change it, would you know that he had changed it?

A. I guess I would.

(Record, pp. 1308, 1309.)

MICHAEL NOLAN, a witness called on behalf of libelant Wilhelmsen, on redirect examination, testified as follows:

Redirect examination, questions by Mr. Bristol:

Q. Captain Nolan, in view of Mr. Minor's cross examination, and the questions he asked you about the clearance between the ships, I want you now, if you will, please to give the Court the benefit of your knowledge and observation and experience as a pilot as to what the "Thielbek" and "Ocklahama," when you first saw them, could have done to have avoided that collision, if you know.

Mr. MINOR: If your Honor please, I want to object to that question. Of course, it isn't redirect examination, and in the second place, it is irrelevant. The law, as Mr. Bristol correctly said, tells what the duty of the vessels is, what they could do.

COURT: There are conditions where they can't observe them. Conditions might arise where they can't observe them.

Mr. MINOR: What he would have to do, would be to show what the conditions were, not to show what might have been done; show the conditions. The law of the conditions is what fixes their duty.

COURT: I understand that.

Mr. MINOR: If he wants this witness to testify conditions, I have no objections; but if he wants to ask a question, what they could have done, I submit it is not a proper question and not redirect examination; and it is not a proper question,

because the law says what should be done under proper conditions.

COURT: I think he can testify as an expert. Let him answer. He can testify as an expert what good navigation would suggest.

Mr. BRISTOL: That is what I am driving at.

Q. Under these circumstances delineated by Mr. Minor on cross examination, I want you to give the Court the benefit of your opinion, as the witness he has qualified you to be, what, if anything, could be done by the "Thielbek" and "Ocklahama," as a matter of navigation, to avoid that collision, if anything. Tell it in your own way, if you can.

(Record, Vol. 2, pp. 960, 961.)

A. Gentlemen, in telling it, I would like for you to take into consideration, before I would say anything, that it does not reflect on the other man on the other boat.

COURT: Tell the facts about it. Just your opinion, that is all.

A. **AT THE TIME OF SEEING THE "THIELBEK," AND PLACING THE CONDITIONS AS THEY WERE, THERE WAS ROOM TO PASS HAD THE "THIELBEK" BEEN NAVIGATED, THAT SHE WAS UNDER CONTROL TO STOP, HAD AN EMERGENCY ARISEN TO BE STOPPED. THE CHANNEL WAS CROWDED. WHEN I SAY CROWDED, THERE WERE TWO SHIPS IN A VERY SMALL SPACE, AND THE**

CREW OF THE "OCKLAHAMA" KNEW THAT. HAD THE SHIP BEEN NAVIGATED SLOWLY, WE WILL SAY HALF SPEED, SHE COULD HAVE BEEN MANAGED IN A RESPECTABLE DISTANCE FOR BACKING HER AND STOPPING HER, BUT AS IT WAS, WITH FULL SPEED THEREON, HAD THE "OCKLAHAMA" ASSUMED HER RIGHT, AND HELD HER RIGHT, AND BLOWN ONE WHISTLE, IT IS MY OPINION THERE WOULD HAVE BEEN NO ACCIDENT.

(Record, Vol. 2, pp. 961, 962.)

SPECIFICATION OF THE ERRORS.

(Rule 24, Sub. 2-b.)

As set forth in the assignment of errors (Record, Vol. 1, pp. 257 and 281) and this appellant *does now specify* wherein the decree and matters adjudicated by the Court June 24, 1915, are erroneous:

FIRST SPECIFICATION:

THAT THE ACTIONS AND DETERMINATIONS OF THE COURT BELOW WERE ERRONEOUS IN THIS, TO-WIT: THE COURT ERRED IN MAKING THE ORDER OF OCTOBER 25, 1915, CONSOLIDATING ALL FOUR TRIAL CAUSES UPON APPEAL, FOR THE REASON THAT SAID CAUSE 6116 WAS THEN APPEALED TO THIS COURT AND NOT WITHIN THE JURIS-

DICTION OF THE COURT BELOW; AND FOR THE FURTHER REASON THAT NO APPEALS HAD BEEN TAKEN OR WERE PENDING OR HAVE SINCE BEEN TAKEN IN CAUSES 6129, GRACE, AND 6130, DU PONT, AND HAD NOT YET BEEN FULLY DETERMINED; AND FOR THE FURTHER REASON THAT CAUSE 6111 HAD NOT THEN BEEN DETERMINED AND WAS NOT APPEALABLE UNTIL ALL PROCEEDINGS THEREIN HAD BEEN TERMINATED AND PROCEEDINGS IN SAID CAUSE 6111 DID NOT TERMINATE AND BECOME SETTLED UNTIL FEBRUARY 7, 1916, (RECORD VOL. 1, P. 146), *reference being had in support of this specification of error to the Thirty-fourth and Thirty-fifth Assignments of Errors.*

(Record Vol. 1, pp. 282 and 283.)

SECOND SPECIFICATION:

THAT THERE WAS ABUSIVE DISCRETION ON THE PART OF THE COURT BELOW IN DISALLOWING AND WITHOLDING COSTS FROM WILHELM WILHELMSEN AND DENYING RECOVERY THEREOF AGAINST THE PORT OF PORTLAND ON THE GROUNDS OF THE OPINION OF DECEMBER 14, 1914, FOR THAT THE PORT OF PORTLAND HAD FAILED IN AND HAD ABANDONED ITS DEFENSE OF FAULTY STEERING GEAR AND DEFECTIVE PROPELLOR UPON AND IN REGARD TO WHICH WILHELM WILHELM-

SEN HAD BEEN COMPELLED TO TAKE TESTIMONY; AND BECAUSE THE ENTIRE RECORD IN THE COURT BELOW ON ALL THE CAUSES HAD BEEN PAID FOR BY WILHELMSEN AND WAS BEING USED BY ALL OF THE PARTIES AND HAS SINCE BEEN USED ON THIS APPEAL AND IN THE PROCEEDINGS IN OTHER CAUSES; AND FOR THE FURTHER REASON THAT THE COURT ENTERED IN FAVOR OF KNOHR & BURCHARD, LIBELANTS FOR AND CLAIMANTS OF THE "THIELBEK," AND AGAINST WILHELMSEN WITHOUT ANY RIGHT OF RECOVERY THEREFOR AGAINST THE PORT OF PORTLAND IN THE SUM OF SOME $2,300.00, *reference being had in support of this specification of error to the Seventh and Thirty-sixth to Thirty-ninth Assignments of Errors, both inclusive.*

(Record, Vol. 1, p. 283.)

THIRD SPECIFICATION:

THAT THE COURT ERRED IN DECIDING THAT THE STEAMER "THODE FAGELUND" WAS ALONE AT FAULT, *and this specification is based upon Assignments of Errors Second to Twelfth, both inclusive, and also upon Fourteenth and Twenty-ninth.*

(Record, Vol. 1, pp. 265-268; 273-274.)

FOURTH SPECIFICATION:

THAT THE MATTERS AND THINGS SET FORTH ON RECORD PAGE 187, VOUME 1, WERE ENTIRELY DISREGARDED BY THE COURT, *and this specification is based on the Twenty-eighth Assignment of Error.*

(Record Vol. 1, p. 273.)

FIFTH SPECIFICATION:

THAT THE PLEADINGS OF KNOHR & BURCHARD AND OF THE PORT OF PORTLAND AS IN THIS BRIEF SET FORTH AND IN THE RECORD MORE FULLY SHOWN ARE AGAINST AND DO NOT SUPPORT THE DECREE OF JUNE 24, 1915, AND ALLEGE AND SHOW GROUNDS EXACTLY CONTRARY TO THE CONCLUSIONS REACHED BY THE COURT WITH RESPECT TO THE "THIELBEK" AND "OCKLAHAMA," *and this specification is based on the Thirtieth and Thirty-third Assignments of Errors.*

(Record, Vol. I, pp. 274-276, and the excerpts of the pleadings hereinbefore shown.)

SIXTH SPECIFICATION:

THAT IT APPEARING FROM THE EVIDENCE WITHOUT CONTRADICTION OR CONFLICT THAT THE "OCKLAHAMA" WAS A POWERFUL TUG AND HER TOW EASILY HANDLED AND THE "THODE FAGELUND"

THE BURDENED VESSEL, THERE WAS AMPLE ROOM AND OPPORTUNITY AT ALL TIMES FOR PEASE TO HAVE AVOIDED THE COLLISION AND AS THE PILOT RULES ARE NOT FOR THE PURPOSE OF CREATING, BUT OF AVOIDING, RISK OF COLLISION, THE COURT ERRED IN ENTERING ITS FINDINGS AND DECREE AS IT DID IN DISREGARD OF THE PLAIN AND UNCONTRADICTED FACTS IN EVIDENCE, *and this specification is based upon the Fifteenth, Sixteenth, Twenty-sixth, Twenty-seventh, Thirty-first and Thirty-second Assignments of Errors.*

(Record, Vol. 1, pp. 269, 272, 275.)

SEVENTH SPECIFICATION:

THAT IT WAS AGAINST THE LAW AND AN ABUSIVE DISCRETION OF THE COURT, AFTER HAVING CONSOLIDATED THE CASES FOR TRIAL, THEN, OVER THE OBJECTION OF WILHELMSEN, TO ALLOW THE SAME TO BE SEPARATED INTO DIFFERENT PARTS AND PROCEEDINGS AND OVER HIS OBJECTION ENTER AN INDEPENDENT DECREE IN FAVOR OF THE "THIELBEK" IN ITS CASE AND ALLOW SAID CAUSES TO BE SEVERALLY PROSECUTED AT DIFFERENT TIMES AND TO DIFFERENT DECREES AND THEN TO DENY WILHELMSEN EQUITABLE, JUST AND COMPETENT RELIEF IN RESPECT OF THE MATTERS AND THINGS THUS

BROUGHT ABOUT IN A PROCEDURE IN THESE CAUSES WHEREIN THE COURT MADE THE CONDITION OF PAYMENT OF THE AMOUNT FOUND TO THE "THIELBEK" A CONDITION PRECEDENT TO THE RIGHT TO ENFORCE HIS CLAIM OR CLAIMS AGAINST THE PORT OF PORTLAND, *and this specification is based upon Assignments of Errors Eighteenth to Twenty-fifth, both inclusive.*

(Record, Vol. 1, pp. 270 to 272.)

EIGHTH SPECIFICATION:

THAT IT WAS AGAINST THE LAW AND INEQUITABLE FOR THE COURT TO RENDER THE DECREE OF JUNE 24, 1915, AGAINST WILHELMSEN AS OWNER AND AGAINST HIS SHIP THE "THODE FAGELUND" DIRECTING SATISFACTION *IN REM* **BEFORE THE PORT OF PORTLAND DETERMINED BY THE COURT TO BE THE PRIMARY TORT FEASOR** *IN PERSONAM* **HAD BEEN CALLED UPON TO PAY AND REASONABLE EFFORT HAD BEEN EXERTED TO OBTAIN PAYMENT FROM THE PORT OF PORTLAND,** *and this specification is based upon the Thirteenth Assignment of Error.*

(Record, Vol. 1, p. 268.)

NINTH SPECIFICATION:

THE DISTRICT JUDGE HAVING FOUND IN HIS DECISION AND FINDINGS OF NOVEMBER 16th THAT

"The pilot of the "Fagelund" promptly blew "two blasts of his whistle and put his helm "hard-astarboard (where it remained until the "collision) but receiving no answer, stopped his "engines and a few seconds later, estimated to "be ten or twelve, repeated the signals which "were promptly answered by the 'Ocklahama,' "but as the 'Ocklahama' did not appear to change "her course the 'Fagelund,' within five or six "seconds after the exchange of signals, ordered "her engines full speed astern, causing her bow "to swing to starboard, blew four blasts of her "whistle and, after the engines had been backing "for about a-minute-and-a-half, dropped her port "anchor, and almost immediately she was struck "on the port bow a few feet from the stem by "the bow of the 'Thielbek,' which plowed into "her some distance almost on a line fore and "aft."

IT FOLLOWS THAT ALL OF THE ADJUDICATION AND DECISION WHICH IS THE BASIS OF THE DECREE OF JUNE 24, 1915, IS CONTRARY TO AND AGAINST THE EVIDENCE AND FACTS THUS FOUND BY THE COURT AND THAT IT WAS INEQUITABLE AND UNJUST AND AGAINST THE EVIDENCE TO FIND THE "THODE FAGELUND" ALONE AT

FAULT, *and this specification is based upon the First Assignment of Error.*

(Record, Vol. 1, p. 265.)

TENTH SPECIFICATION:

THE RECORD SHOWS THERE WAS NOT THE REQUISITE FINALITY AS TO ALL OF THE PARTIES IN THE DECREE OF OCTOBER 25, 1915, (RECORD, VOL. 1, P. 127) UNTIL THE COURT HAD ENTERED THE FINAL DECREE JANUARY 3, 1916, (RECORD, VOL. 1, P. 137) AND THE PORT OF PORTLAND CANNOT, THEREFORE, BRING SAID CAUSE HERE FOR THERE IS NO JURISDICTION TO SUSTAIN IT AND THERE ARE NO SPECIFICATIONS OF ERRORS FILED BY IT TO SUPPORT AN ATTEMPTED APPEAL, *and this specification is based upon the record herein.*

ARGUMENT.

(*Rule 24, Sub. 2-c.*)

Points of Law and Fact Discussed.

The demon *"speed"* is the *real* cause of this collision. The entry in the *"Ocklahama's"* log and casualty report that it was a *"head-on-collision,"* and the Court's finding that the colliding blow was given *"in a line almost fore and aft"* demonstrates that Pease kept on farther than he ought to have gone. More especially, when the *"risk*

of collision" opened, the vessels thus appear "*head and head, or nearly so.*"

The demon "*speed*" was the *real* cause of this collision. Eggars saw the "*Thode Fagelund*" from his position on the starboard (rail) poop deck of the "*Thielbek*" *before she whistled the first time.* Oehring and Eggars both on the "*Thielbek*" noted the passing of Elmore Cannery light about fifteen to twenty minutes after leaving the "Thielbek" anchorage; and they saw it abeam, and noted passing this *red light* before the "*Thode Fagelund*" was seen by Eggars *off the starboard bow* of "*Thielbek*" before "*Thode Fagelund*" whistled *the first time.* (*Note the evidence hereinbefore set out in this brief.*) The "*Ocklahama*" *was then going full speed* and *must have been bearing up* to fetch the reach of the river towards Gilman Buoy, or Flash Light Buoy No. 2. *Eckhart saw her, too.*

The demon "*speed*" caused this collision because the "*Thielbek*" struck the "*Thode Fagelund*" so as to push her steel stern to starboard, and rode up on the steamship with her sharp prow and poked her own starboard anchor through her own starboard bow plates and cut a hole 19 feet wide and 26 feet deep into the "*Thode Fagelund*" and below the water line thus wrecking the port bow hawse pipes of the "*Thode Fagelund*" and stoving in the winch machinery, bow chocks and all the steel stanchions, plates and beams for several feet on the port bow of

"Thode Fagelund." It took "speed" to inflict such injury.

The Bailey Gatzert, 170 Fed. 101 at 103.

The Bailey Gatzert, (C. C. A. 9th C.) 179 Fed. 47, at middle of page.

The Santa Maria, 227 Fed. 149.

According to these declarations of law, announced in this *Gatzert* case by this Court, there is no escape from the fact that *speed*, and *speed* alone, did the damage and caused the collision.

Pease had *at least* 700 feet, by his own sworn statement, if not 1000 feet, *as he first said, after the exchange of answered signals,* within which to control and manoeuver his tug and tow.

Pease furthermore says he had so much power that his tug could turn the *"Thielbek"* around even against her own helm. Turppa, master of the *"Ocklahama,"* says he knew it took *five minutes full speed astern* with the *"Ocklahama"* to stop the *"Thielbek"* and the tug in Portland harbor; which experiment he himself tried with this identical ship.

Pease knew what he had and saw what was before him, but bore up with *full speed* towards a crowded and narrowed passage way, and then lays the blame upon the *"Thode Fagelund."*

He admits without any controversy or contradiction that he regarded himself the *"privileged vessel"* and did not purpose to release what he

thus claimed, or was educated to believe, even against the positive injunction of the *Pilot Rules* if he could get away with that shifting of the burden of responsibility. But he, at the same time, admits *that it was impossible for him to have avoided the collision.* When asked why he did not do so, he answered he had to protect himself. He did so, at other's disaster and consequence. This Court refused its approval in such cases in this Circuit on a previous occasion under circumstances where the navigator *kept on, ran too close* and impinged his vessel on the bow of another:

The Manzanita, 176 Fed. 871.
The Virginian, 217 Fed. 616.
The Santa Maria, 227 Fed. 157.

Under the pleadings (as herein shown) and under *State vs. Turner,* 34 Or. 175, a tug and tow are in fact (in this case) and in law one vessel; *and that under steam.* The navigation of the *"Ocklahama"* was the navigation, therefore, of the *"Thielbek."* It follows that the Port of Portland committed a *maritime tort* by navigating the *"Ocklahama"* so as to bring the *"Thielbek"* and *"Thode Fagelund"* into collision. And it also follows that the *Pilot Rules* control and determine what ought to have been the *safe* and *prudent* navigation of these vessels.

These rules, among other things, require, that when ships are in the *fifth position,* approaching

obliquely, the ship bearing the other on her starboard side shall pass astern of that other, and *this latter shall hold her course and speed.*

Now, if Pease was to be sustained in claiming privilege under this rule it must appear *from all the facts that when this situation was first presented to him he promptly acted upon it. But he did not. He waited. But he did not signal for a port passage;* nor claim the privilege.

And by the range lights of the "Thode Fagelund" then appearing to Pease and her green light, which he saw for a moment as he states (and then that it was shut out by the stern of the dredge) *he knew the vessels appeared to him on crossing courses and the rules cited demanded of him to blow one whistle and hold his course and speed. This he did not do.*

Moreover, if that act by him did not accomplish and remove the risk of collision, Rule 7, page 20, of the Pilot Rules required him to *absolutely stop his vessel. This he did not do.*

The pilot rules were not created to render a collision possible or to justify a collision when brought about.

The *"risk of collision"* is a state of things which calls for action; and if it arises from uncertainty as to the course of the other vessel or as to the action of those on board, it is to entertain the probability that that vessel has done something which, if in fact she has done it, will produce risk of collision, and then a person who

is aware of the fact of this probability of risk is compelled by law to consider that there is risk. And, therefore, Pease, having a vessel which had to act for risk of collision, cannot be permitted to cut things fine or delay action if there is a reasonable chance at the time of collision that of itself is sufficient to call for immediate action. Indeed, it is held under the English law that it is not even given to wait until a green or red light is seen at night before action is required if the masthead light alters its position, and the vessel so observing is required to deal with it accordingly.

Pease had *become pilot of the "Ocklahama"* in April, 1913, and this collision took place in August, 1913. The father of Pease is a member of the Port of Portland Commission and sits on the board, and also a pilot.

Pease, the younger, is retained in the employment of the Port of Portland, and Nolan's services were dispensed with shortly after the collision happened.

(Record, p. 849.)

Neither *Gerdes* on the *"Thielbek"* nor *Eckhart* on the *"Ocklahama"* knew or observed the significant and impelling things leading to this collision.

When Pease swears that the "Thode Fagelund's" whistle was an unusual whistle and should not have been given, it results that the obligation rested upon the "Ocklahama" and

Pease to comply with Rule 1 of the Pilot Rules (page 18 of the Pilot Rules) viz: *To blow one whistle and hold his course and speed, and this Pease did not do.*

It must never be forgotten that Pease saw the "Thode Fagelund" above the dredge, and taking the testimony by its four corners, without any contradiction, Pease saw the "Thode Fagelund" before the "Thode Fagelund" saw him, *and Pease saw the situation first.*

ARCHIE LEROY PEASE, Jr., a witness called on behalf of Knohr & Burchard, having been previously sworn, testified as follows:

Direct Examination—Questions by Mr. Wood:

Q. Mr. Pease, you are the Archie L. Pease, the same one that testified before, and you are usually called Roy Pease, are you not?

A. Yes, sir.

Q. What is your age?

A. Born February 10, 1886.

Q. You said, I think yesterday, that you first saw the "Fagelund" when you were just a little below Callender dock?

A. I should judge that was about the place.

Q. At that time you received the two whistles from the "Fagelund"?

A. Well, shortly after I saw her; matter of seconds; about that time, yes. They blew their whistle just as the green light was shutting out by the stern of the "Chinook."

Q. *So you saw her for an instant or two before she whistled?*

A. *Yes, sir.*

Q. Where was it in relation to the dredge "Chinook" when you first saw her?

A. She was above the "Chinook" coming down.

Q. And about how far away from you?

A. You mean approximately?

Q. Yes.

A. *Oh, about a quarter of a mile.*

(Record, pp. 1178 and 1182.)

Pease, as well as Eggars and Oehring, saw the *"Thode Fagelund"* clear of the dredge *"Chinook" and in the clear before she whistled* the *first* time. Pease waited; *but at full speed.*

As already pointed out, Pease actually was when he did whistle *"head and head or nearly so"* with the "Thode Fagelund." (Nolan saw both red and green lights of the tug and tow when he whistled the *second time.*) Pease then answered, and *backed full speed astern.* Was he in doubt then?

If so, the Pilot Rules, to which *Pease's* particular attention was called on the stand, provide that when signals given are not understood or are doubtful to the other vessel that vessel shall sound her alarm signals and indicate by new signals her course and purpose; hence, the rules

always designed to prevent and not to accomplish *"risk of collision"* afforded Pease, in the facilities of *quick action* he asserted he had with his powerful tug, and in the clear distance open to him to entirely avoid the *"Thode Fagelund"* for there were 700 feet clear ahead of him and 700 feet between the *"point of contact"* and the docks to his starboard. He says himself, *he could have held his own course up, around by the docks, and avoided collision. Time* as well as *distance* allowed amply for this movement. The rules provided for it.

But Pease testifies he kept on—went farther than he ought to have gone—went indeed too far; and when he did, he broke and tore loose every hawser on the tow and tug and *"parted all the lines."* THE SPEED IS SHOWN INDUBITABLY BY THIS FACT AND THE HOLE IN THE *"THODE FAGELUND."*

Pease in his written reports to his owners and to his superintendent, and to the United States Inspectors, deliberately showed that *he had not stopped, that headway was not off his vessel.*

His own sworn statement, however, with which there is no conflict shows that he answered the *"Thode Fagelund's" second* signal and *then backed full speed astern and gave no signal of his doing so.* Yet, having done so, the impact tore his lines loose, stove in the bows of both ships and ran his tug the "Ocklahama" away forward of her previous fastened position. He swears he

was backing thus at *full speed three* (3) *to four* (4) *minutes,* and so states in his written reports above mentioned.

Under the ruling of this Court in the *Bailey Gatzert* case, *supra,* this was *speed* and *too great a speed for safe and prudent navigation. It caused the collision,* and inflicted the injuries resulting in the damages awarded.

The allegations of the Knohr & Burchard libel hereinbefore set out are particularly pertinent to and support the foregoing argument, *and especially allege that the "Ocklahama" was left in charge of a young and inexperienced pilot, and that her master was in his bunk while navigating a narrow passage where ships were likely to be met, and that therein The Port of Portland was at fault; that the "Ocklahama" and tow approached said passage at full speed, and that therein The Port of Portland was at fault; that the pilot of the "Ocklahama," upon receiving the first whistle from the "Thode Fagelund," put her helm to starboard and failed to answer said first whistle of the "Thode Fagelund," and in so doing was negligent, and therein The Port of Portland was at fault; that the "Ocklahama" was negligently navigated in that no signal was given that her engines had been put full speed astern.*

(Record, p. 171.)

Both Pease and Turppa knew that the *"Thode Fagelund"* was heavily laden and going to sea.

Turppa saw her at anchorage the evening before, and navigated the *"Ocklahama"* between her anchorage and the beacon buoy on the trip down river. The Port of Portland admits this relevant fact in its answer. (See *"The Pleadings"* herein.) Pease says when he started with the tow the next morning it was his purpose to go around by the docks to give a wide berth to both *"Thode Fagelund"* and the dredge "Chinook" which he knew were anchored in the upper harbor of Astoria. He *expected* to meet them on his up trip, *that morning.*

The *"Thode Fagelund"* was heavily laden and riding deep draft in the water, and so was a sluggish and slow moving hulk when first departing her anchorage. *In fact,* had gone but some twelve hundred feet on her outward bound voyage when struck. The Court below in its findings (Record, p. 88) (November 16th, 1914) says:

"The pilot of the "Fagelund" promptly blew two blasts of his whistle and put his helm hard-astarboard (where it remained until the collision) but receiving no answer, stopped his engines and a few seconds later, estimated to be ten or twelve, repeated the signals which were promptly answered by the "Ocklahama," but as the "Ocklahama" did not appear to change her course the "Fagelund," within five or six seconds after the exchange of signals, ordered her engines full

speed astern, causing her bow to swing to starboard, blew four blasts of her whistle and, after the engines had been backing for about a-minute-and-a-half, dropped her port anchor, and almost immediately she was struck on the port bow a few feet from the stem by the bow of the "Thielbek," which plowed into her some distance almost on a line fore and aft."

THE PORT OF PORTLAND CASUALTY REPORT.

Date of Accident, August 24, 1913. Location, Astoria Harbor.

Nature of Casualty, Head-on Collision.

Name of steamboat, barge or dredge, **"Ocklahama" towing bark "Thielbek" and "Thode Fagelund."**

On trip from Astoria.

DAMAGE TO PROPERTY OTHER THAN THE PORT OF PORTLAND.

Under this head report all accidents, resulting in any damage or loss to wharves, vessels or other property, other than Port of Portland. State exactly what was damaged, the amount, what action was taken after accident to prevent further loss, and what was done toward repairing damages.

S. S. "Thode Fagelund" had a large hole stove in her port side a few feet from her bow and extending from the deck of her forecastle-head to a little below her water line.

Brk. "Thielbek" had a couple of plates stove in on her starboard side and a number of others dented on both sides of her bow.

DAMAGE TO THE PORT OF PORTLAND PROPERTY.

Under this head report all accidents to Steamboat, Barge, Dredges, Wharves, Dry Dock, or other Board property. Estimate amount of damage; state how caused and what was done to prevent and repair the damages, and by whom assistance was rendered if any; force of wind; state of weather, and if at night, whether dark, moonlight or starlight.

All the Str. "Ocklahama's" lines carried away consisting of

One wire tow line,
One rope head line,
Two rope breast lines,
Three rope stern lines.

Witnesses: Address:

Pilot A. L. Pease, Jr., on Watch.

H. E. Campion, Supt.

I. Turppa, Captain.

FROM THE FOREGOING SHOWING IT APPEARS WITHOUT ANY WANT OF CERTAINTY WHATEVER, THAT THERE IS NO CONFLICT IN THE TESTIMONY OR DOUBT ABOUT THE FOLLOWING FACTS, ON WHICH WE SUBMIT THE COURT COULD MAKE DIRECT FINDINGS SUPPORTING THE ALLEGATIONS OF WILHELMSEN'S LIBEL:

First. Pease did not on first seeing the "Thode Fagelund" blow one whistle and hold to his course, and speed.

Second. Pease says himself his course was up by the docks around by Gilman Buoy to give vessels anchored there a wide berth.

Third. Pease did not promptly answer the "Thode's" whistle, and thereby misled Nolan concerning the definiteness and certainty of the "Ocklahama's" subsequent intention and movements.

Fourth. Pease waited one-half a minute, while going a ship's length and until he closed up his ¼ mile distance to one thousand feet before he acted; and even then kept on.

Fifth. Pease, while tenaciously holding to protect himself as he testifies, never stopped his vessel.

Sixth. Pease ran half speed ahead after signal exchange and before reversing during the interval when the view of the "Fagelund" was the

certainty of head-on collision within a minute's time.

SEVENTH. When within seven hundred feet Pease tenaciously held to the stern of the dredge notwithstanding he was backing full speed and could easily handle and turn his tow; and this, before "Thode's" green light shut in.

EIGHTH. The rent in the "Fagelund's" bow, and the turning of her stem to starboard establishes that the vessels came together so nearly head on that another foot would have put the "Thielbek" to the starboard or right side of the "Thode's" stem.

NINTH. The fact that the anchor shank or haft hanging at the starboard hawse pipe of the "Thielbek" was driven directly through her starboard bow establishes that the impact of the vessels was substantially in the line of their respective keels.

TENTH. Pease admits it was not impossible for him to have avoided collision.

ELEVENTH. Pease, however, swears THAT A MINUTE BEFORE THE COLLISION and that before the danger signals were given he thought there would be a collision.

TWELFTH. Pease swears "I WENT FARTHER THAN I SHOULD HAVE GONE" and "IN FACT, I WENT FARTHER THAN I WANTED TO GO," and also "I STARTED OF COURSE AND HAD

TO KEEP GOING LONGER THAN I EXPECTED TO HAVE TO GO."

THIRTEENTH. The failure to stop the swift-moving "Ocklahama" and "Thielbek" and the continuance of their speed without stopping to afford clear passageway to the "Thode Fagelund" after agreed signals, was the main unquestioned cause of this collision.

FOURTEENTH. Everything that should have been seen was clear and open to the view of Pease to be seen and acted on by him before any collision was *imminent,* that is, there was sufficient clear vision and distance for him at all times to act promptly, carefully and *efficiently.*

FIFTEENTH. Pease's conduct, direction and speed and in continuing and maintaining them after the "jaws of collision opened" and passage became narrow was another of the main unquestioned causes of this collision.

SIXTEENTH. The failure of Pease to follow Rules I to III at page 18 of the Pilot Rules, even after whistle of "Thode Fagelund" given and before Pease answered when he had seven hundred clear feet between her and the Astoria docks, and to refuse such course as the "Thode Fagelund" wanted, was another unquestioned cause of this collision, especially when Pease *entertained any doubt* either as to (a) position, (b) clearance, (c) course, or (d) intention of the

"Thode Fagelund" or *even if he believed* the signal as given by her was (1) unusual, (2) wrong if without reason, (3) and that there was no reason to give such signal.

SEVENTEENTH. It was open to Pease under the Pilot Rules and the laws of navigation to hold his course and speed *prior to the "Thode Fagelund's" first two whistles* and to have subsequently gained that same right by immediate compliance of four (4) blasts showing his real doubts of her intention and course (Rules, p. 18 Pilot Rules), but in failing to do either of these readily available things *which devolved upon him solely and alone,* at that stage of the circumstances, his failure caused the collision.

EIGHTEENTH. The law provides *"the misunderstanding or objection* SHALL AT ONCE *be made apparent by blowing the danger signal"* (Pilot Rules, p. 20, top of page, 2nd paragraph) and "BOTH STEAM VESSELS SHALL BE STOPPED, *and backed if necessary, until signals for passing with safety are made and understood."* (In, Pilot Rules No. VII, p. 20); BUT PEASE DID NOT STOP. The hawsers carried away. His report to the Port of Portland, and to the United States Inspectors, and his own evidence, conclusively show his headway still on at collision. The injury and impact demonstrate the force of the blow and the speed. (*The Bailey Gatzert,* 170 Fed. 103; 179 Fed. 47, top page 48);

and the violation of these requirements of the law by Pease was another unquestioned cause of the collision.

NINTEENTH. It is clearly the preponderance of uncontradicted and nonconflicting testimony that both the masters of the "Ocklahama" and the "Thielbek" were asleep and the conduct of the tug and tow was left by them solely and only to Pease.

TWENTY. That the actions of Pease do not constitute the performance of *"efficient"* pilotage and his failures and omissions are those of the Port of Portland.

These facts so determined in connection with the entry in the "Ocklahama" log and in the casualty reports describing the contact as an *"head-on-collision"* demonstrate to a moral certainty the accuracy of the conclusion that Pease went TOO FAR—FARTHER THAN HE OUGHT TO HAVE GONE—AND TOO FAST.

Verbal testimony, however creditable, is never allowed in admiralty cases to overcome demonstrated physical facts. The testimony, therefore, of Capt. Shaver, a member of the Port of Portland; of Turppa, the master, or of Pease, the pilot, that *full speed with* a tow in a crowded harbor on a clear night is a safe speed, does violence to the physical facts of the case. However much their combined judgment thus expressed may be valued, it can not be taken as establish-

ing proper and safe navigation against the pressure of hard physical facts and the admission of Pease himself that his powerful tug *could have* avoided not only the *"risk of collision"* but the actual collision itself.

The Bailey Gatzert, supra.

These considerations thus far are not founded upon *conflicting evidence* but upon direct and positive admissions, statements and explanations, made and given by witnesses who swore themselves to be in the best position to see and to know; and why the Court below apparently disregarded their application brings the cause here on the specifications of error already herein set forth. The pleadings were also apparently disregarded on the points here thus explained. For the same things were alleged and articulated by the libeling parties, and some of these things were actually reiterated in the answers of The Port of Portland as hereinbefore set out. It seems to appellant Wilhelmsen that the Court below as specified did not determine the cause as presented nor find, as it should have done, upon what was actually submitted to it. The whole decision, opinion and decree is put upon grounds which dismiss from consideration *the evidence set forth in this brief.* There is no conflict in this evidence; it is all one way.

THE CASE CONSIDERED FROM NOLAN'S VIEWPOINT.

There is only one previous citation of Nolan's testimony made in this brief and that is his answers on redirect examination to the subject matter introduced before him by Mr. Minor, (Record, Vol. 2, pp. 960 to 962), (See *ante*, herein just before *"Specifications of Errors"*).

With respect to previous testimony, there is no conflict in Nolan's interpretation of his own position.

It is worthy of note, also, that Mr. Wood, the proctor for Knohr & Burchard, asked leave, and it was granted, to amend his libel upon another ground of negligence.

These portions of the record pertinent hereto are as follows:

MICHAEL NOLAN resumes the stand.

Cross-Examination continued—Questions by Mr. Wood:

Q. Captain, the testimony of Captain Hansen, which I referred to yesterday, and which Mr. Bristol objected to my stating unless I read it to you was this: Captain Hansen first tells about this conversation between you when he tells you "she may turn on you, Pilot," and you said "All right, sir. I know it, but it can't be helped." Then I asked whether any other conversation and he said, —I asked him, "And that is all the conversation you had about it?"

"A. That is all we had, and that is all we spoke to one another until we finished, and Nolan was a little worried and upset and I said, 'It is no use to worry.' And I also heard that somebody said there had been a row between us and the pilot, but you may state that is absolutely false. There is no such thing.

Q. Now, I want to know what conversation you had that he refers to that is where you appeared to be upset, and he said, "There is no use to worry about it."

A. I said yesterday that the conversation in that line was in regard to what had been done; that is, in this matter of the blowing of the whistles. They answered nothing. Telegraphed signals to the engine room. What was done. I

(Record, p. 893.)

think that, to the best of my knowledge, was all gone over, and if I appeared to Captain Hansen to be worried at that time, I want to state now the reason of it. I feel up from the time that I landed in this country, 22 years ago, up to that time, that my record on board a vessel, or anywhere ever I have been, has been excellent, and **I REGARDED THAT SITUATION OF THAT ACCIDENT AT THAT MOMENT AS BEING A STUMBLING BLOCK TO ME FOR THE REST OF MY LIFE**, and why wouldn't I at that time be upset and worried, after the collision had taken place? I put any man in responsibility on the

"Thode Fagelund," and ask if he wouldn't be worried. **I REALIZED THE DANGER THERE. I WAS SENT THERE BY THE PORT OF PORTLAND TO PILOT THAT SHIP OUT TO SEA. I WENT ABOARD THE "THODE FAGELUND," AND CAPTAIN HANSEN ACCEPTED MY SERVICES, AND EVERY ORDER I ASKED ABOARD THAT SHIP, AND EVERY COMMAND I GAVE WAS GIVEN FREELY AND WILLINGLY, AS TO THE BEST OF THEIR ABILITY, ABOARD THAT SHIP. THEREFORE, THE RESPONSIBILITY OF THAT ACCIDENT WAS NOT ON CAPTAIN HANSEN'S SHOULDERS OR MANAGEMENT.** And there is no reason why I wouldn't feel upset at that time.

Q. I didn't ask you whether you were upset or not. I asked you what was the conversation. Can you tell me?

A. I told you in the beginning just everything aboard of the vessels, signals to the engine room, answers given to the "Ocklahama," from the "Ocklahama," what was done, to the best of my knowledge. That is all.

(Record, p. 894.)

Q. Let me ask you this, Captain. You said I didn't get it straight. Captain Hansen, some time after you had reversed the engine, said, "If you continue backing, pilot, it will swing on you." That is what he said, about, isn't it? That is what he meant, I don't quote his exact words.

A. "You will cause the ship's head to swing to starboard."

Q. Yes, and then you said that you answered, "I can't help it; everything must be done to get her headway off, and to stop her swinging to starboard." Now, is that what you answered?

A. I will repeat the answer.

Q. Just tell me yes or no, if that is what you answered. Then you can go on and explain.

A. Your language and mine I don't think agree, because you ask me a question and want me to answer. Let me answer what actually was said.

Q. I don't want you to answer any other way than what was said.

A. All right. Captain Hansen said, "Pilot, if you continue to back this steamer, you will cause her head to swing to starboard." I said, "Yes, sir; I know that, but everything must be done that can be done to stop her headway, and stop her head from swinging to starboard." Now, that is about as near as I can, the actual words that passed. Now, Mr. Wood, in repeating this so many times, there may be something, some word or other, that I left out, or put another in, but that is about the average of it.

Q. I only care for the sense of it. Well, how were you going to stop her head swinging to starboard, under the reversed propellor?

A. The anchor being on the bottom, caused her head to stop. She would have to tear her

anchor through the bottom; therefore, her anchor being in contact with the bottom, would steady the ship's head.

Q. That is what I want. You relied on the anchor to stop the ship swinging to starboard.

(Record, pp. 866 and 867.)

Further cross-examination on behalf of Port of Portland—Questions by Mr. Minor:

Q. Captain Nolan, I show you a paper, and ask whether that is not the original report you made to The Port of Portland?

A. Yes, sir; that is my signature at the bottom.

Q. As I understand now, to go back to my question, at the time when you gave the first passing signal, in your judgment, you couldn't have passed safely port to port?

A. That is the question; that is the question that settles this point.. Had the "Thielbek" blown one whistle, there was roon to make a port passing, because she assumed to clear to port there. The "Thode Fagelund" was the ship that was burdened, and would have answered with one whistle, and would only have assumed the responsibility of colliding with the "Chinook." The other vessel had the distance between me and the Callender dock, which was the nearest point of contact, which was 600 feet to navigate in.

(Record, p. 948.)

Q. The answer is satisfactory to me, and I suppose the Court will understand. I do.

COURT: If he wishes to add an explanation, he may do it. I don't know that it is necessary.

Mr. MINOR: I don't either. I merely want to be fair with the witness before the Court.

A. The only thing I had reference to, Mr. Minor, and the only thing that I brought it up here for, was this: **THE PORT OF PORTLAND EMPLOYED ME, SENT ME ON BOARD THE "THODE FAGELUND," TO NAVIGATE THE SHIP, AS I SAID. THE CAPTAIN ACCEPTED ME; EVERY ORDER THAT I ASKED FOR WAS GIVEN WILLINGLY. I ACCEPTED THE RESPONSIBILITY OF THAT SHIP, AND I ALONE,** and after the accident it was my intention, if I had to sever my connection with The Port of Portland immediately, I was going to do so, but I was going to defend my actions on that particular time before this Court, and leave the matter clear before that.

(Record, p. 955.)

Mr. WOOD: In view of the Captain's testimony and that of Hansen, I want to amend my libel, in alleging the "Thode Fagelund" was negligent in lifting her anchor, when she could, by waiting a few minutes, have cleared the "Chinook."

Mr. BRISTOL: We will resist that upon that ground that it was an afterthought, and on the

ground they knew the position of the "Thode" in any event the night before.

Mr. WOOD: I intend to ask leave to amend in another particular, and will take it up after lunch.

Adjourned until 2 p. m.

Portland, Oregon, Friday, Sept. 11, 1914, 2 P. M.

Mr. WOOD: Your Honor, as I said before adjournment, I wish to amend my libel. Do you wish to hear that now? I suppose I ought to make a statement at the close of the testimony.

COURT: You have given notice of it. That is all that is necessary for the present.

(Record, pp. 972 and 973.)

THE DECRETAL ORDER OF JUNE 24TH, 1915, AGAINST "THODE FAGELUND" IN REM IS AGAINST THE FOREGOING EVIDENCE AND AGAINST THE LAW; *and amendments to pleadings were necessarily allowed.*

A case in admiralty is initiated by pleadings but tried upon the evidence and the entire record and the issues thus determined are brought within pleadings then deemed to be amended accordingly.

The Court should have taken the entire record in this case and decided the issues against and placed the liability upon The Port of Portland, rightfully as to both ships, save and except the *in rem* decree against Wilhelmsen's vessel, for as to her, the faulty navigation was that of the port.

The record in this case is made up by proceedings *in rem* and *in personam* and the liability found by the Court is a liability *in personam* only after consideration of the whole record. But it is plainly erroneous and against the law to charge the *"Thode Fagelund"* with all or any part of the damage suffered by the *"Thielbek."*

First, because The Port of Portland is alone, under the decision of the Court, decreed liable and there is no independent negligence found upon the part of the *"Thode Fagelund"*; and the

port alleges that Nolan was in charge and directing the navigation of that ship.

(Record, pp. 62 and 63.)

SECOND, because the fault attributed to the *"Thode Fagelund"* is the fault of The Port of Portland and not her fault;

THIRD, because the Court does not find any, and the decision shows no fault or negligence on the part of the *"Thode Fagelund"* aside from the negligence of the pilot, Nolan, an employee of The Port of Portland;

(Record, pp. 62 and 63; *The Thielbek,* 218 Fed. 253.)

FOURTH, because it is the purpose of admiralty to reach the ultimate end of litigation promptly and effectively, and the decree required upon this record was one based upon all the evidence and issues presented.

FIFTH, because the owners of the *"Thielbek"* sued The Port of Portland and the *"Thode Fagelund"* jointly and the liability found by the Court is a liability *in personam* against the Port, but it decrees satisfaction *in rem* against the *"Thode Fagelund."*

SIXTH, because Knohr & Burchard have not proved any legal fault on the part of the *"Thode Fagelund"* separate and apart from The Port of

Portland as a fault contributing to the collision; (*The Thielbek,* 218 Fed. 253.)

SEVENTH, the rule of *respondent superior* as to Wilhelmsen is not satisfied *because Nolan was not an employee of Wilhelmsen.*

It is well settled in the admiralty practice that where the cause is fully presented upon the merits and all the facts have been received in evidence without suggestion of surprise or express desire to put in further evidence, *the cause should be determined upon the merits of the whole case according as justice requires and that the pleadings should be deemed amended to conform to the facts proved.*

Lauderdale County v. Kittel, 229 Fed. 593.

The Maryland, 19 Fed. 557.

The Rhode Island, 17 Fed. 560.

The City of New Orleans, 33 Fed. 683.

In the courts of admiralty of the United States there are no technical rules of variance which will prevent the recovery by libelant who shows a meritorious case, but under the liberal and equitable practice amendments will be allowed even to a change of the libel.

DAVIS V. ADAMS (C. C. A. 9th C.) 102 Fed. 524.

In fact the court may award any relief under

a general prayer which the law on the whole record applicable to the case warrants.

Admiralty Rule 24.

It is the duty of the court to extract the real case from the whole record and decide accordingly.

The Syracuse, 12 Wall. 167, 20 L. Ed. 382.

In *Davis v. Adams* the Circuit Court of Appeals of the Ninth Circuit says, 102 Federal, page 525:

"The libel being *in personam* and the facts proven tending to establish a cause of action which might be prosecuted *in personam,* there does not appear to be any good reason why the libelant should not be permitted to amend his libel to conform to the facts of the case."

In the Circuit Court of Appeals of the Second Circuit the rule is the same:

The Minnetonka, 146 Fed. 515.

In that case the court was held to have power to permit an amendment of the libel to conform to the proof so as to render a decree *in personam* against a claim for excess damage, citing *The Syracuse, supra.*

The Supreme Court of the United States has announced this doctrine several times, as follows:

Du Pont de Nemours v. Vance, 19 How. 162, 15 L. Ed. 584;

The Syracuse, 12 Wall. 167, supra.

The Gazelle, 128 U. S. 474, p. 487, 32 L. Ed. 500.

The general principle, therefore, is that if the record in the cause shows the subject matter of the controversy to be the question upon which the court awards relief and there is a general prayer for relief, the court may in every case upon the whole record consider what relief is to be awarded and pronounce it accordingly.

The Supreme Court of the United States went further than this in

Du Pont v. Vance, 19 How. 162, 15 L. Ed. 584,

And the Circuit Court of Appeals of the Second Circuit again in

Vogeman v. *Raeburn,* 180 Fed. 97.

deny an objection saying that it would amount to a miscarriage of justice to deprive libelant of his damages because the pleader had based his claim upon a mistaken theory *if the course of trial had been the same if the libel as amended had been originally filed.*

In the case of *The Livingstone,* 104 Fed. 918, it is held that where all the parties in interest were before the court and participated in all the controversies arising in the suit, *even the failure to file a libel will not preclude the party from recouping an amount justly due on the whole case* and the court will make a decree and pro-

nounce for him accordingly on the whole case even without a libel, 104 Federal, page 927, following *Davis v. Adams in our own Ninth Circuit.*

O'Keefe v. Staples Coal Co., 201 Fed. 131.

Libel by John S. O'Keefe and others against the Staples Coal Company seeking to recover damages for injury to their schooner caused by alleged negligence on the part of the respondent's tug in towing the schooner. *The negligence complained of is in bringing the schooner into collision with the county bridge.*

The respondent filed a petition which alleged that *the owners of the bridge are wholly responsible for the collision and ought to be sued for the resulting damages, the County of Bristol being impleaded.*

The court held that the county would be liable for the negligence of its employees in the operation of a draw bridge, *although they were in the performance of a public duty and under the law of the state exempt from liability,* the general maritime law which creates such liability being paramount and not controlled in an admiralty court by any rule of local law.

Again in the same case, 201 Federal 135, it was held that *the injury was due solely to negligence of the bridge tenders employed by the county,* for which negligence the county was liable, *passing a decree against the county solely,* the court saying:

"There must be an interlocutory decree for the libelants against the County of Bristol. As against the tug the libel must be dismissed. The circumstances of the case seem to require, however, that no final decree thus dismissing the libel should be entered until after the amount of damages recoverable from the county has been ascertained, so that the result reached as above can then be carried out by one final decree disposing of the entire case."

See also the same case, *O'Keefe* v. *Staples Coal Co.*, 201 Federal, 144, wherein it was held that the libelants were to have *a decree in their favor for the full amount of their damages against the county.*

This result, however, was denied appellant herein when he asked for it, in this case.

(See Record, pp. 230, 239 and 242.)

It is quite without the reasonable deductions which the court below attempted to make,

(The Thielbek, 218 Fed. 253.)

upon the evidence thus to be considered, to account for this collision simply because the Court assigns reasons *not entertained by the pilots themselves,* whom The Port of Portland maintains are experts in their trade. Moreover, the superintendent Campion and Master Turppa are arrayed against the deductions made by the Court below. So, proctors for all parties practically were forced by the Court's viewpoint to ask and obtain amend-

ments to comport with the theories the trial Court announced. It is quite plain however that much evidence was not considered, some disregarded entirely, and the pleadings of all parties necessarily therefore came within the rules above cited.

Moreover the Court itself had previously said: *"That The Port of Portland is liable for a maritime injury due to the fault of its tow boat or the negligence of its pilot is settled in this Court."*

The Thielbek, 211 Fed. 686, following,

United States v. *The Port of Portland* (D. C.) 147 Fed. 865;

The Port of Portland v. *United States,* 176 Fed. 866, 100 C. C. A., 336.

This being the law, and the Court having found that The Port of Portland, through its pilot, brought about the injuries, why decree *in rem* for the "Thielbek"?

It is equally hard to get a satisfactory solution from the Court's opinion when analyzed in its four corners, (218 Fed. 252, 253), the Court distinctly finds and says that Pilot Nolan, an employee of The Port of Portland, *controlled the navigation of the "Thode Fagelund."*

The Court also found:

(a) 'But as the "Ocklahama" did not appear to change her course, etc."; and

(b) "The bow of the "Thielbek" plowed into

her some distance almost on a line fore and aft"; and that

(c) "It was thought wise to wait," etc., "in order to more accurately ascertain her position and intention"; and

(d) "That the range lights began to close up, whereupon the engines of the "Ocklahama" were stopped and put full speed astern under a port helm, in order to give the "Fagelund" time to make the passage before the "Ocklahama" would come up to the "Chinook"; and that

(e) "She was navigating in a narrow channel"; and that

(f) "The signals given were unusual and clearly excused the pilot of the "Ocklahama" from answering them until the "Fagelund" came out from behind the dredge"; and

(g) "If the "Ocklahama" had continued on the course she was pursuing at the time the signals were exchanged she would have passed at least 300 or 400 feet south of the place of collision."

And of the charges of negligence on the evidence in this brief pointed out, the Court said:

"But these are either not sustained by the testimony or did not contribute to the collision."

The Court further said:

"She was struck on her port bow almost head on, showing that if she had gone but a short distance to port, as she signalled she intended to do,

the "Ocklahama" and her tow would have passed in safety."

(The foregoing references are from pages 252, 253 and 254 of volume 218 Federal Reporter and have been set out here for the Court's convenience.)

It is to be noted that these things so specified from the Court's decision are neither consistent with the result of the opinion nor with each other, certainly not with the sworn testimony of Pease himself, and certainly not consistent with the result in condemning the "Thode Fagelund" alone.

Of these comments, shortly in their order:

If it be true that the "Ocklahama" did not appear to change her course and plowed into the "Thode Fagelund" almost head on (bottom of page 252 and also bottom of 254) it necessarily results that the vessels were not on crossing courses and the fifth position did not apply.

In order to aid this Court it has been pointed out that both Eggars and Oehring, as well as Pease himself, positively swear without contradiction that they saw the "Thode Fagelund" before she signalled, then why wait *"to more accurately ascertain her position and intention?"* If the purpose of stopping and backing the "Ocklahama" was to give the "Thode Fagelund" more time (middle of page 253) then Pease's sworn testimony, as well as the reports to his employer

and to the United States inspectors, that he was backing at full speed from three to four minutes from a point 700 to 1000 feet away, cannot be reconciled with this finding of the Court nor with the rest of the testimony nor the result, or else if it is believed, then we reach the indubitable conclusion that if the 'Thode Fagelund" was navigating in a narrow channel so also was the "Ocklahama" and the speed was too great, as has been heretofore shown.

Upon the point of the Court's finding that the signals were unusual and excused Pease (near bottom of page 253) and that the "Ocklahama," if she had continued on her course, would have passed 400 feet south of the place of collision (top of page 254) it is sufficient to say, as previously shown by the casualty reports, by the log of the "Ocklahama," as well as by the evidence and the Court's findings, this was a *"head on collision"*; and it could not have been a *"head on collision,"* under the circumstances found by the Court, to excuse Pease, if it be true that the "Ocklahama" would have run 400 feet south of the place of collision or that the signals were unusual with reference to a starboard passing when Pease himself swore as herein shown that they were right.

So we respectfully ask this Court on the part of this appellant to consider this evidence herein pointed out and determine this case equitably

and according to the weight and effect of the testimony herein set out.

THE PORT OF PORTLAND CANNOT AVAIL ITSELF OF LIMITED LIABILITY UNDER STATE STATUTES.

STATE LEGISLATION CANNOT ALTER OR ENLARGE THE PRINCIPLES OF MARITIME LAW.

WHEN MUNICIPAL CORPORATIONS UNDERTAKE THE MANAGEMENT OF SHIPPING FACILITIES FOR COMPENSATION, THEY BECOME AMENABLE TO THE GENERAL MARITIME LAW.

ESPECIALLY IS THIS SO WHERE THE SUBJECT MATTER, BY REASON OF THE SHIPPING INVOLVED, IS INTERNATIONAL IN CHARACTER.

The Port of Portland in this case undertakes, while availing of a limitation under an act passed by the people under the peculiar system we have in Oregon, to say at the same time that things done by it under that act are *ultra vires* its powers.

The Supreme Court of the United States long ago announced the rule of law that corporations are liable for every wrong they commit and in such cases the doctrine of *ultra vires* has no application and it makes no difference how foreign

the acts constituting the tort may be to the object of its creation or beyond its granted powers. Its offenses might even be such as will forfeit its existence.

Railroad Co. v. Quigley, 21 How. 209;

First National Bank v. Graham, 100 U. S., 699; 25 L. Ed. 750.

Chesapeake & Ohio R. Co. v. Howard, 178 U. S. 153, at p. 160.

The Court in this last case says:

"If the agents and servants of a corporation commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is *ultra vires*, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement."

Chesapeake v. Howard, 178 U. S. 160.

Will this Court nevertheless permit The Port of Portland to plead *full power and authority*, and then deny it and urge *ultra vires* doctrine?

Let us examine its own pleadings on this subject, and the attitude it represented and held out to the public.

The Port of Portland pleads in its several answers *its due and legal creation*, and that *it is authorized and empowered*, among other things:

For a further answer to the libel, this respondent respectfully shows unto your honors:

ARTICLE I.

This respondent is a municipal corporation, duly created, organized and existing under and by virtue of a certain act of the Legislative Assembly of the State of Oregon, entitled "An act to establish and incorporate 'The Port of Portland,' and to provide for the improvement of the Willamette and Columbia Rivers in said port and between said port and the sea," filed in the office of the Secretary of State February 18, 1891, and under and by virtue of sundry amendments of said act filed in the office of the Secretary of State respectively February 10, 1893, February 18, 1899, March 1, 1901, February 23, 1903, and February 26, 1903, and under and by virtue of an amendment to the said act of the Legislative Assembly proposed by initiative petition in 1908 *and duly adopted by the legal voters within the corporate limits of the Port of Portland* at an election held on the .... day of June, 1908, and under and by virtue of said act and the amendments thereof, and particularly under and by virtue of the said amendment of June, 1908, *The Port of Portland is authorized and empowered, among other things:*

* * * "to purchase, lease, control and operate steam tub-boats and steam and sail pilot boats upon such rivers and upon the Columbia bar pilotage grounds, *and to collect charges*

from vessels employing such tugs so operated and for pilotage services rendered by employes of said The Port of Portland, and said The Port of Portland shall have the right to claim and collect salvage for services rendered to vessels in distress in the same manner *as a natural person. The charges for towage and pilotage* shall be fixed by the Board of Commissioners of The Port of Portland *and shall be public and published to the world.* The charges for towage *of sailing vessels* shall include the services of such pilots as may be supplied by The Port of Portland. The charges for pilots supplied by The Port of Portland to steam vessels shall be fixed by its Board of Commissioners, but shall in no respect exceed the charges fixed by the State of Oregon for pilots upon the bar pilotage grounds and upon the river pilotage grounds upon the Columbia and Willamette Rivers."

(Record, p. 206.)

(Italics mine.)

The Supreme Court of the State of Oregon in *Farrell* v. *Port of Portland,* 52 Oregon 582, put *res adjudicata,* for the purposes to be considered here, the matters and things now attempted to be raised and asserted by the ingenious proctor, for the port in this case.

The Farrell suit was brought to enjoin the carrying into effect of the provisions of the initia-

tive amendment on the ground that the law was void because, first, the people of Portland had no power under the constitution to propose and adopt at the polls amendments to the act incorporating The Port of Portland, and, second, that if any such power existed it could not be exercised in pursuance of a general law at least until such general law had been enacted and that the law as adopted and in question was not in fact an amendment of the charter of The Port of Portland, but an attempt to confer powers not germane or logically connected therewith. In the course of the opinion Justice Bean very carefully announced the ground of his decision and said in the latter part of the opinion, 52 Oregon, page 590:

"Upon the same reasoning we think it can be legally authorized to operate and maintain tug and pilot boats as aids to and for the purpose of promoting the maritime, shipping and commercial interests of the port. It goes without saying that the establishment and maintenance of an efficient towage and pilotage service between Portland and the sea would promote greatly the shipping and commercial interests. The deepened river which The Port of Portland is authorized to maintain would be of but little value, unless towboats were provided to tow ships between the sea and the port, or unless an efficient pilot service is provided for entering and departing vessels."

Thus announcing the definite policy under a flat interpretation of the law that it was for the benefit and not for the restriction of the rights of shipping.

Coming before Judge Bean, again in this case, he examined into the facts and the law and on November 24th, 1913, gave his decision on the point as follows:

"In conducting a pilotage and towage business "it is not exercising powers and duties imposed "upon it as a mere agency of the state for public "general purposes, but is a mere substitute for "individual enterprises.. It undertakes to supply "to shipping the same accommodations that "would be supplied by a private corporation or "individual engaged in the same business. It "charges and receives compensation therefor, and "should, I take it, be held liable for the negligence "or incompetence of its employes, the same as "others engaged in the same occupation.. Nor "does the fact that it must employ pilots licensed "by the state affect its liability any more than it "would the liability of a private corporation en- "gaging such pilots."

(Record, Vol. I, p. 493.)

There are no degrees of difference in the character, duties and the entity which goes to make up municipal corporations so classed *that they will include cities and exclude ports such as The Port of Portland,* and the Supreme Court of

the United States decides that where there is anything in the nature of a substitution of an individual enterprise out of which result compensation by way of fees and money constituting a fund devoted to the maintenance of the enterprise and the carrying on of the facilities concerned therein, that the exceptions ordinarily enforced by courts in favor of municipal corporations then will not exist under the martime law.

The Supreme Court of the United States, after considering all of the common law questions and the decisions of a variety of courts with reference to the obligations and liabilities of municipal corporations, finally reached this conclusion:

"By the general admiralty law of this country often declared by this court a ship by whomsoever owned or navigated is liable for an actionable injury resulting from the negligence of her master or crew to another vessel, and that this rule of law was not subject to any modification because the property of a municipality could not be sued in rem and concluded that the prerequisite in admiralty to the right to resort to a libel in personam is the existence of a cause of accident maritime in its nature and that a collision upon the navigable waters of the United States creates a maritime tort and a cause of action within the jurisdiction of the courts of admiralty without question, and therefore that the rule of local law in the State of New York does not control the maritime law and afforded no ground

for sustaining the non-liability of the City of New York in the case at bar."

Workman v. *New York,* 179 U. S. 552; 45 L. Ed. 314.

This Court is aware that the following cases in this circuit determine the position of The Port of Portland in admiralty:

The John McCraken, 145 Fed. 705;

United States v. *The Port of Portland,* 174 Fed. 865;

United States v. *The Port of Portland,* 161 Fed. 193;

The Port of Portland v. *United States,* 176 Fed. 866;

Workman v. *Mayor of New York,* 179 U. S. 553, 45 L. Ed. 314, 332.

This being the relation of The Port of Portland under the general law, it is wise to note that in the printed tariff issued March 15, 1912, and which Campion says was in effect August, 1913, and not changed until April 30, 1914, (see record, pp. 1009 to 1024), *there is not a single word of reference of any kind whatsoever promulgated by The Port of Portland to the public, either domestic or international,* in its relation with the port *about any limitations of liability or of any condition of performance of the service to be rendered by it.*

As heretofore shown in this brief and as will hereinafter appear for the aid of the Court, the

brochure issued by The Port of Portland under the terms of the act which requires, as hereinafter shown, that the *"charges for towage and pilotage shall be public and published to the world," there is not a single word of mention of any limitation of liability*, but on the contrary, although this brochure is issued January 1, 1912, there is not a single word about any limitation of liability or anything notifying the public affecting the towage and pilotage on the river conducted by it whereby any relation is created as is now being claimed.

(Record pp. 1071 to 1080.)

The Court is asked to remark closely that these brochures were distributed through Mr. Talbot, the general manager.

(Record p. 1080.)

The liability in these causes does not arise from the breach of a pilotage or towage contract, but from the fact that a collision—an exclusively maritime subject matter—happened upon the navigable waters of the United States and within the jurisdiction of this Honorable Court; and consideration of that subject matter in orderly conduct of procedure in accordance with admiralty and maritime jurisdiction has resulted in the bringing into court of the offending instrumentalities involved in this collision to answer for

their respective liabilities as the same may be found.

Foster v. *Compagnie,* 219 Fed. 351.

Under the maritime law a suit against a tug for damages by collision arises out of a wrong done by the tug and because of the maritime tort committed; and in admiralty there is a fixed rule for the division of damages applying to all participating boats or persons involved in the subject matter. The courts of the country have held that a tug is not subject to the obligations of a common carrier, but is only required to exercise ordinary care, caution and maritime skill, but for failure of any of these the tug boat is held fully responsible.

Southern Towing Co. v. *Egan,* 184 Fed. 275;

"The Adelia," 154 U. S. 593;

"The Blue Bell," 189 Fed. 824, 827;

"The E. V. McCaulley," 189 Fed. 829.

A suit, therefore, by the owner of a tow against her tug to recover for an injury to the tow by negligence on the part of the tug is a suit *ex delicto;* that is to say, the claim for damages is a claim in tort and not in contract. The claim in tort arises out of the duty imposed by law and is independent of any contract made or consideration paid or to be paid for the towage.

The earlier cases are:

The Brooklyn, 2 Ben. 547;

The Deer, 4 Ben. 352;

The Arturo, 6 Fed. 308;

The Liberty No. 4, 7 Fed. 230;

The Quickstep, 9 Wall. 665, 19 L. Ed. 767;

The Syracuse, 12 Wall. 167, 20 L. Ed. 382.

The later cases are:

The John G. Stevens, 170 U. S. 113, 124, 42 L. Ed. 969, 974;

See also *170 U. S.* pp. 124, 125.

The J. P. Donaldson, 167 U. S. 599, 603, 42 L. Ed. 295;

The W. G. Mason, (C. C. A. 2nd C.) 142 Fed. 913 at middle of p. 918;

The Temple Emery, 122 Fed. 180.

In one of the early cases decided by the Supreme Court of the United States and cited in Wilhelmsen's main brief, THE QUICKSTEP, 9 Wallace, page 665, 19 L. Ed. 768, it is said:

> *"The libel was not filed to recover damages for the breach of a contract as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of which is the wrong suffered by*

the libelant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

The Supreme Court of the United States again in The John G. Stevens, 170 U. S. pages 124 and 125, (this case was cited in the main brief), held that a claim arising against a tug for damages arising from collision with a third vessel because of negligent towage *is a claim in tort.*

Sovereignty extends no farther than to a vessel territorially within its dominion. Rights asserted on state statutes can then only be enforced in admiralty against resident owners of domestic shipping owned or navigated in the state where the proceedings are instituted, or against the fund arising from surrender, where maritime subject matter not connected with injuries resulting in death gives jurisdiction.

La Bourgoyne, 210 U. S. 136;

Crapo v. Allen, 1 Sprague, 184;

Rundell v. *La Compagnie Transtlantique,* 94 Fed. 366.

International Navigation Co. v. *Lindstrom,* 132 Fed. 475;

La Bourgoyne, 139 Fed. 433, 439;

Same case, 210 U. S. 138.

The holdings in these cases are:

"The territorial sovereignty of a state extends to a vessel of that state when it is upon the high

seas, the vessel being deemed a part of the territory to which it belongs, and it follows that the state statute which creates liability so authorizes recovery for the consequences of a tortious act and operates as efficiently upon the vessel of the state when the vessel is beyond the boundaries as it does when the vessel is physically within the state."

In the LINDSTROM case, prior to the Circuit Court of Appeals' decision in the 132 Federal above cited, District Judge Thomas took occasion, in the course of his opinion, to point out the distinction for which endeavor is made in this brief, and I give it in full:

"But it is urged that this holding contravenes the decision of THE ALASKA and kindred cases. There is no analogy whatever. When the state in special or general term legislates concerning a ship, and what exists or happens on board of her, it has to do with its own domain and subjects, and nothing else. When it gives a cause of action for damages resulting from negligent acts or omissions, in the first instance, to the offended person, or, if he die from the offense, to his representative, it legislates for the government of those who are standing on the soil of New York, and doing or omitting acts as inhabitants of the state. The state exercises no dominion over the sea, nor over those disconnected with its political rule. It defines the supreme law, subject to federal jurisdiction, for an in-

tegral part of its territory and the inhabitants thereof. In THE ALASKA, the facts were that an English ship herself independent of all but English authority, and sailing on the high seas, a place uncontrollable by the state of New York, ran into The Columbia, a vessel from New York, and drowned the latter's crew. The English ship, herself beyond the sway of the state of New York, navigated by those who owned no allegiance nor duty to such state, was sailing upon a sea, itself without the supremacy of that state, and did a wrongful act, not on the American ship, hence not upon or within the territory or jurisdiction of New York, but on the ocean, common ground for all nations, but under the municipal sovereignty of none. **THE STATE OF NEW YORK MAY PRESCRIBE HOW ITS OWN SHIPS SHALL BE CONDUCTED, THE PENALTIES FOR MISCONDUCT THEREON; BUT IT MAY NOT DEFINE HOW OTHER VESSELS SHALL BEAR THEMSELVES WITH REFERENCE TO ITS OWN SHIPS WHEN ON THE HIGH SEAS, NOR CREATE CAUSES OF ACTION FOR INJURIES OR DEATHS PRODUCED BY SUCH FOREIGN SHIPS.** In one case the statute of the state has an extraterritorial effect, in the other it has no effect, as the offender is foreign to its power, and commits his wrong at a place over which the state has no jurisdictoin."

It is thus observed that, with subject matter cognizable in admiralty for basis of suit, the

farthest limit which state statutes can go, in the exercise of the sovereignty of the state as applied to the shipping under the control of the state, is to form a basis of claim for participation in the fund upon surrender; and that by the express holding of the Supreme Court of the United States the state statute can have no effect whatever unless the facts bring the subject matter, that is the ownership of the vessel or residence of her owners and the maritime subject of the controversy, within scope of maritime law.

The Alaska, 130 U. S. 201; 9 Sup. Rep. 461; 32 Lawyers' Ed. 923;

The Albert Dumois, 177 U. S. 240;

The Hamilton, 207 U. S. 398;

La Bourgoyne, 210 U. S. 138;

The following late cases demonstrate this view of the maritime law:

La Bourgoyne, 210 U. S. 138;

The Rockaway, 125 Fed. 692,

holds that state statutes of this character must be construed as applicable only to vessels used wholly in domestic waters.

The Circuit Court of Appeals, of the same circuit in which the case of The Rockaway arose, affirms this holding in

The Vigilant, 157 Fed. 747.

The very interesting remarks of this court

adopt the language of Judge Putnam in the case of

The Iris, 100 Fed. 104, 112.

The jurisdiction of the District Courts of the United States in collision cases is exclusive.

The Moses Taylor, 4 Wall. 411;
The Hine, 4 Wall. 555;
The Belfast, 7 Wall. 624.

Furthermore, the jurisdiction of the courts of the United States is independent of state ligislation and that jurisdiction cannot be impaired or diminished by the statutes of the several states in any way whatsoever.

Barron v. *Burnside,* 121 U. S. 186, 30 L. Ed. 915;

McConihay v. *Wright,* 121 U. S. 201, 30 L. Ed. 587;

THE MOSES TAYLOR, 4 Wall. 429;

CHICAGO V. *WHITTEN,* 13 Wall. 286, 20 L. Ed. 577.

State navigation laws can not regulate the federal courts;

The Steamboat New York v. Rae, 18 How. 223; 15 L. Ed. 359.

Even contracts enforceable *in admiralty* are not be dealt with in conformity to state rules.

Watts v. *Camors,* 115, U. S. 353; 29 L. Ed. 407.
Liverpool & G. W. S. S. Co. v. Phenix, 129 U. S. 397, and 410 and following pages.

The Circuit Court of Appeals of this Circuit in the case of

THE DAUNTLESS, 129 Fed. 715-719, considered two separate cases: The first case was No. 952 and was a proceeding *in rem* brought by the administrator of John T. Doane, deceased, against the steamer Dauntless for damages occasioned by the death of Doane.

The second case was No. 953, and was a proceeding *in personam*, likewise brought by an administrator against Union Transportation Co., the owner of The Dauntless, for damages occasioned by the death of Kent.

These cases were disposed of by the Circuit Court of Appeals of the Ninth Circuit as follows:

The case *in rem*, No. 952, was dismissed.

The case *in personam* was sustained and damages decreed.

In reaching these conclusions the court followed *The Albert Dumois* and *The Onoko*, above cited, and after quoting copiously from these cases, speaking through Justice Hawley, said:

> *"We are of opinion that no substantial dif-*
> *"ference can be drawn between the statutes of*
> *"the different states upon which The Albert*
> *"Dumois and The Onoko were based, and the*
> *"statutes under consideration. If any distinc-*
> *"tion exists, it must be conceded that the*
> *"language of section 813 of the Code of Civil*
> *"Procedure of California is stronger in favor*
> *"of appellants' contention than the others; and,*

"in the light of these opinions, and in view of "the language used in the California statute, "we feel compelled to hold that in the Doane 'case this court has no jurisdiction. That case "is reversed, and the cause remanded, with "instructions to dismiss the action."

The Dauntless, 129 Fed. 719.

A very apt illustration as applied to this case arises from the Circuit Court of Appeals of the Sixth Circuit, February 8, 1910, *Mack Steamship Co. v. Thompson*, 176 Fed. 499, wherein that court, considering a state statute on the subject of a lien right claimed by it to be given, said at page 503:

"If the local statute be construed to be without restriction as to the credit intended, it would give to a creditor at the home port of the owner an advantage superior to that of one who furnishes supplies or other assistance at a foreign port, a result THE VERY OPPOSITE TO THE GENERAL POLICY OF THE MARITIME LAW. A local statute which should give a lien absolutely and without regard to this rule, which rests upon a fundamental principle of the maritime law and is born of the necessities of commerce, WOULD BE IN EFFECT TO MAKE A NEW LAW FOR THE ADMIRALTY. If this can be done in respect to one thing, it may be done in many, AND IN THE END THE ADMIRALTY JURISPRUDENCE MIGHT BE HONEYCOMBED, IF NOT

DISPLACED, BY A MASS OF HETEROGENEOUS LOCAL STATUTES. Local statutes provide different rules in respect to the rank of liens, a matter of serious importance. A COURT OF ADMIRALTY WOULD ABANDON ITS OWN JURISDICTION, IF IT SHOULD ENFORCE THEM WHEN THEY WERE IN CONFLICT WITH THE RULES OF MARITIME LAW. And, if this be so, it must be because of the predominant authority of the admiralty court throughout the domain of the maritime law, which will not hearken to the ordinances of state legislation."

Further application of these doctrines is found in the case of THE FRED E. SANDER, decided October 20, 1913, in the District Court for the Western District of Washington, Northern Division, in 208 Federal, page 725.

The whole case is pertinent to the considerations which we have at bar and particularly the reference to the *Workman* case made upon page 729; and epitomized, the holding is:

"A STATE IS WITHOUT POWER TO ABOLISH OR LIMIT THE JURISDICTION OF COURTS OF ADMIRALTY OVER MARITIME TORTS CONFERRED BY THE CONSTITUTION."

The rule for division of damages is an ancient and honorable rule in the admiralty long previous to the admission of Oregon as a state into the union and necessarily when Oregon came

into the union it came in subject to the laws of the United States and of the general maritime law of the country as administered by its courts.

The Max Morris, 137 U. S. p. 1.

Beldon v. Chase, 150 U. S. 691.

The Victory, 68 Fed. 400.

Greenwood v. Westport, 60 Fed. 578;

The Mystic, 44 Fed. 399.

The Oregon, 45 Fed. 74.

The Serapis, 49 Fed. 397.

It results that this court would not be free to exercise untrammeled its full and exclusive jurisdiction under the general maritime law if the state statute of Oregon in the particulars pleaded and argued by The Port of Portland were enforced.

That is to say, the admiralty system of laws is within the exclusive control of congress and the states have no power to regulate or to legislate in regard to it, or, as said by the Supreme Court of the United States, "A statute of a state cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases."

In *BUTLER V. BOSTON & SAVANNAH STEAMSHIP CO.,* 130 U. S. p. 527, syl. 5; 32 L. Ed. p. 1024, the Supreme Court says, referring to the statute of Massachusetts:

"Whatever force it may have in creating

liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea. Not only is that law the common right of the people of the United States, but the national legislature has regulated the subject, in greater or less degree, by the passage of the navigation laws, the steamboat inspection laws, the limited liability act and other laws."

Within these principles the conclusion must necessarily follow that no legal limitation of liability going to the very elements of a decree pronounceable by a court of admiralty in a maritime matter can be valid either as a limitation of the jurisdiction of the admiralty courts of the United States or as a limitation upon any matter involved before them.

Now in this case the main subjects of the distressful want of care and negligence upon the part of The Port of Portland and its instrumentalities are two foreign vessels: The "Thielbek," a German ship; and with the Empire of Germany the United States has a treaty; and the "Thode Fagelund," a Norwegian ship; and with the Kingdom of Norway the United States has a treaty.

Both of these treaties were in force prior to 1908.

The acts of congress have furthermore provided that any discrimination against vessels navigating the high seas by any law of a state will not be permitted.

Section 4237 *Revised Statutes of United States.*

The constitution and laws of the United States and the treaties made and to be made under their authority are the supreme law of the land and no state can change the effect or purpose of the constitution, those laws or those treaties.

These treaties then and now in force with others made or to be made, and the constitution and laws of the United States are the supreme law of the land, *Hapburn v. Griswold,* 8 Wall. 603; 19 L. Ed. 513; and a state law is void if inconsistent with a treaty, for there can be no law inconsistent with fundamental law.

Sinnott v. Davenport, 22 How. 227; 16 L. Ed. 243.

House v. Mayes, 219 U. S. 282; 55 L. Ed. 213.

These ships belonging to the Empire of Germany and the Kingdom of Norway respectively are not amenable to the laws of Oregon so as to be cut off from the benefit of the general maritime law.

Fisher v. Boutelle, 162 Fed. 994.

The Hamilton, 207 U. S. 398.

La Bourgoyne, 210 U. S. 138.

Why then argue that these two foreign ships coming from the *Seven Seas* are held to know some silent and insidious limitation now first asserted by the Port of Portland, and not even published in its brochure in which it says:

Mr. BRISTOL: I offer this in evidence.

Marked "Libelant Wilhelmsen's Exhibit 13 (Campion)."

(Foreword and Shipping Directions from Wilhelmsen's Exhibit 13.)

FOREWORD.

The Port of Portland Commission in presenting this brochure to the ship owning public, has endeavored to give only facts obtained from the most reliable sources, TOGETHER WITH EXACT DATA RELATING TO THIS PORT'S CONDITIONS AND CHARGES.

Any more information required regarding shipping matters or commercial conditions of this section will be cheerfully supplied upon application, either to The Port of Portland Commission, City Hall, Portland, Oregon, or the Portland Chamber of Commerce, Fifth and Oak Streets, Portland, Oregon.

THE PORT OF PORTLAND.

Portland, Oregon, U. S. A., Jan. 1, 1912.

In the case of *Mersey Docks & Harbor Board v. Gibbs,* L. R. 1, H. L. 93 at H. L. pages 105-107, at page 122, *Lord Cranworth remarked:*

> *"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damages by the negligence of those who have the management of the facilities, they will be entitled to compensation and in others they will not; such distinction arising not from any visible difference in the facilities themselves, but in some municipal difference in the constitution of the bodies by whom the facilities are managed."*

The courts generally have enforced liabilities of such character against municipalities *in personam.*

Thompson Navigation Co. v. City of Chicago, 79 Fed. 984.

Henderson v. City of Cleveland, 93 Fed. 844.

O'Keefe v. Staples Coal Co., 201 Fed. 131.

Greenwood v. Westport, 60 Fed. 560 and 579.

City of Boston v. Crowley, 38 Fed. 202.

The Port of Portland has no right or power of limitation of liability, *first,* because congress has legislated on the matter of limitation of liability to be obtained in a special proceeding pre-

scribed by law; *second,* the states have neither the right nor the power to legislate in respect of admiralty matters which in any wise affect the exclusive jurisdiction of the admiralty courts of the United States; *third,* the practice of the admiralty courts of the United States has, long prior to the passage of any law of the State of Oregon, and, indeed, *prior to the admission of it as a state into the union,* maintained a rule of division of damages for participating faults by joint maritime tort feasors for a tort committed upon the high seas or navigable waters of the United States and it is without the power of any municipality to set that rule or practice aside; and, *fourth,* that The Port of Portland is engaged in the same manner as private persons or corporations in an individual enterprise of conducting the business of towage and pilotage for hire and therefore must perforce of the circumstances take unto itself all of the liabilities and responsibility that would come to private persons in a similar situation without claiming the benefit of any quasi public nature or any atomic sovereignty derived from the state; *fifth,* congress itself has provided a means for limitation of liability in collision causes when the owner is *without privity or knowledge* of acts or facts from which it could be concluded that he was guilty of some want of care; *sixth,* there is no limitation of liability for collision on the high seas in American law, except such as is based upon the

acts of congress; *seventh,* furthermore, it must not be overlooked that tugs employed in the business of towing into and out of harbors and between ports vessels engaged in interstate commerce are themselves instrumentalities of that interstate commerce and that consequently it would *follow that any limitation constituting for any such tugs or any such towing business a privilege or immunity not available to all persons similarly engaged would be not only inimical to the provisions of the constitution, but likewise inimical to the provision of the Sherman Anti-Trust Law.*

United States v. Great Lakes Towing Co., 208 Fed. 733.

Hence, the jurisdiction here of the District Court of the United States was and is solely because of a maritime subject matter occasioned and occurring within its jurisdiction, to-wit, a collision upon the navigable waters of the United States.

The Admiralty rules provide:

"**IN ALL SUITS FOR DAMAGE BY COLLISION, THE LIBELANT MAY PROCEED AGAINST THE SHIP AND MASTER, OR AGAINST THE SHIP ALONE OR AGAINST THE MASTER, OR THE OWNER, ALONE,** *IN PERSONAM.*"

The maritime law is not of one interpretation in one community and of another and entirely

different interpretation elsewhere, for if that were the case the persons, and the property of those persons, "who go down to the sea in ships," could never be administered with financial success or certainty of operation. The whole body of the maritime law never permitted, nor was there known to it, a conditional limitation or any limitation whatever based upon partial performance of duties reciprocally to be rendered by the persons involved in observing its mandate. According to the maritime law a proceeding against a tug is a proceeding *ex delicto,* arises out of the very body of the wrong and gives a right in the thing, the offending thing, engaged in navigation for satisfaction of the damages committed by it. This maritime law subsisting as an entirety is the subject of peculiar federal jurisprudence and administered by the federal courts without impairment by state legislation. If changes are to be made in the maritime law these changes can only be made by federal authority. Inasmuch as the jurisdiction attaches solely because of the maritime nature of the subject matter, it is both logical and reasonable to say that the rights to be claimed are to be of the same quality as the subject matter.

THE DETERMINATION OF THE COURT UPON THE SUBJECT OF COSTS WAS INEQUITABLE AND OBVIOUSLY AN ABUSE OF DISCRETION, OVER THE OBJECTIONS OF WILHELMSEN.

Wilhelmsen filed his cost bill (Record, page 137) and among other items included those which came within the aspect of the case as it was presented up to the time of trial, and among other items the sum of $477 paid Mary E. Bell, the court stenographer, for the record upon which all of the proceedings up to that time had been had and subsequent proceedings and the appeal prosecuted.

(Record, pp. 138 and 139.)

The items allowed by the Court are shown in the right hand column and the items which were disbursed by Wilhelmsen and which were disallowed by the Court on the objections of The Port of Portland (Record, p. 140) are shown in the left hand column.

The disallowance and objections were footed upon the order of December 14, 1914, (Record, p. 107) as shown by the order entered February 7, 1916, (Record, pp. 145, 146).

In connection with these proceedings Wilhelmsen assigned error (Record, pp. 282 to 284), the Court at the same time having passed to Knohr & Burchard costs and disbursements in the sum of $2247.93, January 3, 1916, (Record,

p. 137), but it had previously taxed costs, the 24th of June, 1915, by the decree appealed from by Wilhelmsen herein, in the sum of $239.49 (Record, p. 247).

It will be observed by reference to Record pages 138 and 139 that the items in the left hand column which are disallowed related to the surety bond given by Wilhelmsen to release his ship, and also to the payments for the taking and transcription of testimony designed to meet the defenses that had been raised by The Port of Portland with reference to defective steering gear and propeller, which defenses The Port of Portland afterwards abandoned.

If it was proper to allow the costs to the "Thielbek" January 3, 1916, as shown, then there should have been a decree in favor of Wilhelmsen against The Port of Portland for those costs.

If it was proper to disallow Wilhelmsen's costs against The Port of Portland by virtue of the order of December 14, 1914, on the condition of an amendment, then it certainly, on the same principle, was an abuse of discretion to refuse those costs to Wilhelmsen when he was put to expense to meet the contentions of The Port of Portland which it abandoned and in respect of which it also was allowed to amend its answer.

Surrounding this action of the Court Wilhelmsen's objections are set out on pages 248 to 253 of the record and also on pages 243 and 245 of the record, both before and after the allowance

of the decree herein appealed from by Wilhelmsen.

The Court's action was on July 19, 1915, on these objections (see Record, p. 261), and Wilhelmsen again called the attention of the Court to this matter on the 7th of February, 1916, and the action of the Court at that time brought about as hereinbefore explained the additional assignments of errors (Record, p. 281) all relating to the way and manner the allowance of costs were made, as if the causes were then consolidated under the order of October 25, 1915, given on the ex parte application of the proctor for The Port of Portland (Record, p. 129).

Now it will be observed that The Port of Portland on the 9th of November, 1915, as shown on record p. 129, *had already served its notice of appeal in the Wilhelmsen case.* But notwithstanding that it had appealed on the 9th of November, 1915, *The Port of Portland entered into this matter of the settlement of costs on the 7th day of February, 1916,* (Record, p. 145), *having previously filed its objections on the 21st day of January, 1916, and took part in the proceedings which culminated in the rendition of the final decree for Knohr & Burchard* and the allowance to Knohr & Burchard of the costs and disbursements taxed at $2247.93 which the Court refused to allow to Wilhelmsen against The Port of Portland.

It is respectfully submitted that in view of this situation in the record, Wilhelmsen should not have been mulcted in these costs, at least without the right of recovery against The Port of Portland. It was manifestly inequitable and unfair to deny Wilhelmsen the recovery of his expenditures to meet the abandoned defense of The Port of Portland. It was manifestly unfair and inequitable to deny to Wilhelmsen the recovery of the amount he paid the official stenographer, Mary E. Bell, for the record which was obtained by all the parties to this cause.

It is therefore submitted that the trial Court exceeded in a legal sense the bounds of reason all of the circumstances before it being considered, and when the entire case is before the Appellate Court it has control of the subject of costs as well as of the merits.

Dyer v. National Steam Navigation Co., (748) 118 U. S. 519, 520.

Trustees v. Greenough, 105 U. S. 527.

WHEREIN THE POSITION OF THE PORT OF PORTLAND IS FURTHER FALLACIOUS, REFERENCE BEING HAD TO ITS BRIEF.

The error in the argument of The Port of Portland lies in the assumption that the liability it is sued on in these cases rests upon statutory foundation.

It argues against the admitted fact that it uses and employs pilots and tugboats and says that such use and employment of pilots and tugboats is *ultra vires.*

It demands a limited liability but with equal inconsistency applies that limitation to both ships injured by it. (See page 98.)

It seems sufficient answer on the face of things to repeat that *the Port was sued in these cases for a collision liability without any relation whatsoever to the State statutes,* that the liability of the Port presented to the Court was its liability under the general maritime law without any reference to any state statute.

The Port is attempting to introduce a state statute as a defense and limitation of its general maritime liability.

In order to put up this argument to distinguish the *Workman case* it very adroitly assumes and admits the correctness of the Court's findings as to Pease and the navigation of the "Ocklahama," but denies that it was answerable for the negligence of its pilot Nolan. (See Argument, page 39.) *"Of the findings of fact The Port of Portland does not complain. Due consideration was given to all the evidence and the findings are fully supported by the evidence,"* but says on page 18, "The Port of Portland not answerable for negligence of its pilot Nolan." It attempts to present, in the middle of page 27 of its brief, the very question made *res adjudicata* in the case

of *Farrell v. Port of Portland, supra,* to which attention of this Court has already been called in this brief.

With this fallacious position as its foundation for argument, the Port continues then to make the surprising declaration that the Court ought not to have allowed any amendments to the libels notwithstanding it allowed The Port of Portland to amend its libel.

Against the positive testimony of its own pilot Nolan set forth in this brief that he was alone responsible for the navigation of the "Thode Fagelund" and notwithstanding its own allegations in its several answers that Nolan controlled that navigation, it now with equal inconsistency embraces the doctrine of *ultra vires* and asserts that the navigation of the tugboat or of any of the vessels involved was not its navigation.

It may be said with equal truth that if the opinion of the Court does not point out in what particular Nolan's act of negligence contributed to the collision that it is not pointed out in the opinion on the other hand how it was that the acts of Pease did not contribute to the collision. (See page 48.)

It is not proposed to take further time to reargue the matters already presented for consideration of the Court in pursuing the amazing attitude that the proctor for the Port sets out in his brief.

It remains, however, to point out that on page

83 the glaring fallacy pursued by the eminent proctor is stated in his own language thus:

> "*Workman v. New York* clearly has no bearing upon a case in which, as in the one at bar, *no right of action or suit could exist except by operation of the local statute.*" (Italics mine.)

The whole brief of The Port of Portland is constructed upon such a theory. It pleads that it was "*duly authorized and empowered,*" as hereinbefore set forth. It pleads *that its own pilot controlled this navigation* and the Court so found *and The Port of Portland admits it.* It asserts "clearly, therefore, this suit, though in form sounding in tort, is based upon a contract—the terms of the statutes creating both The Port's duties and its liabilities—without which no tort would be possible." (See page 68.)

Without further attention to these matters it must be quite clear that against the plain and established rules of law, here in this brief heretofore cited, these borrowed theories of The Port of Portland ought not to prevail.

True it was sued *in personam* for the reason that in the District of Oregon the Federal Court held that even the United States could not sequester the dredge "Columbia" for putting its lighthouse tender to the bottom of the Columbia River in the vicinity of Westport light. But the sovereignty thus acknowledged is not acknowledged to the length that it may modify the whole mari-

time law, change the jurisdiction of the Courts of the United States, interfere with international shipping and create a port with special privileges and immunities more favored than others receive by the application of the general maritime law. By a long and unbroken line of adjudication municipalities have consistently been held liable for their acts notwithstanding their claim of sovereignty upon the application of the general rules of law.

With much stronger reason therefore does the present case appear for by an unbroken line of adjudication of years, states have never been allowed to usurp the right of congress upon national subjects or to independently legislate upon subjects already legislated by congress. More especially, admiralty and maritime affairs of general and international character and relation.

As previously pointed out, the congressional ship owners' liability act is available to The Port of Portland in any case where it can be shown without its privity or knowledge injuries complained of occurred, *and it is not competent for the State of Oregon to set up an independent liability act,* when congress has spoken.

Moreover the federal jurisdiction is exclusive and new methods or new procedure will not be permitted either to confine or enlarge the exclusive jurisdiction established by congress. According to The Port of Portland Your Honors are

forced, if the argument of its proctor is good, to go directly against a long and current line of decisions of the Supreme Court of the United States on the subject of the exclusiveness of admiralty and maritime jurisdiction and are forced, moreover, to overrule a number of decisions rendered in this circuit which stamp with disapproval any attempt to enlarge or confine the exclusive admiralty and maritime jurisdiction of the United States.

"Saving to suitors in all cases a common law remedy where the common law is competent to give it," is written in the statutes of the United States, but no one of the parties to this record was pursuing a "common law remedy," but each suitor was pursuing his remedy in a "cause of collision" under the general maritime law.

The general maritime law does not recognize the right of any sovereignty to set up for itself a limitation within the general body of that law. In fact some of the famous controversies that are now making history for the United States relate to this very international question of *established rule upon the high seas* and the observance of these established rules is demanded of another great nation simply because all the nations of the earth have concurred therein *so far as shipping is concerned* over the Seven Seas.

It is quite astonishing, therefore, that the State of Oregon can be even accredited with the attempt, let alone the authority, *to enact for*

itself, through any of its municipal instrumentalities, a new rule to be grafted upon the general maritime law.

Beyond this Your Honors will note that with reference to domestic shipping the states are allowed to legislate very much as they please with respect to those subjects where the acts of congress have not already provided exclusive regulation, a right or a remedy; but no Court has ever decided that a State statute, however applicable it might be to its domestic ships, can override the acts of congress and the general maritime law of the country and confer special privileges or establish restrictions not recognized by the constitution of the United States, the laws and treaties made and to be made under their authority.

It is manifestly *unfair* and *inequitable* to mulct foreign ship owners, whose ships we invite to carry our commerce, by allowing any municipality, by the claim of sovereignty against the authority of the national government and its Courts, to assert a limited liability *that it does not even publish as required by its own law to the public with whom it deals. (See "Tariffs" and "brochure" in Evidence.)*

In the words of the *Farrell case, "It goes without saying that the establishment and maintenance of an efficient towage and pilotage service between Portland and the sea would promote greatly the shipping and commercial interests.*

The deepened river which The Port of Portland is authorized to maintain would be of but little value, unless towboats were provided to tow ships between the sea and the port, or unless an efficient pilot service is provided for entering and departing vessels."

In the interest, therefore, of full justice and equity, in the interest of the untrammeled administration of maritime justice this appellant appeals to Your Honors for a decision which will establish the full measure of the relief that the evidence and the pleadings seem plainly to entitle him upon this record.

Respectfully submitted,

May 4, 1916. WILLIAM C. BRISTOL,
Proctor for Wilhelm Wilhelmsen of Tunsberg, Norway, Respondent and Appellant.

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